(1)

No. 031699 JUN 22 2004

In The
Supreme Court of the United States

FRED SETTOON, INC., ET AL.,

Petitioners,

versus

MICHAEL GROS,

Respondent.

On Petition For A Writ Of Certiorari To The State Of Louisiana Court Of Appeal, Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether an employee who accepts payments under the Longshoremen's and Harborworkers' Compensation Act (LHWCA) 33 U.S.C. § 905(b) as a result of a formal award by an administrative law judge ("ALJ") from the United States Department of Labor is precluded from seeking seaman remedies under the Jones Act. 46 U.S.C. § 688.

2) Whether a finding of fact by an ALJ for the Department of Labor which determines that a longshoreman spent 5-10% of his relevant work history on navigable waters precludes a claimant from re-litigating this issue in a subsequent proceeding based on the Doctrine of Collateral Estoppel.

LIST OF ALL PARTIES

1. Settoon, Inc., defendant-petitioner.
2. Settoon Construction, Inc., defendant-petitioner.
3. Michael Gros, plaintiff-respondent.

CORPORATE DISCLOSURE STATEMENT

Settoon, Inc. and Settoon Construction, Inc. who, in compliance with Supreme Court Rule 29.6, wish to advise the Court there is no parent corporation or publicly held company holding stock in Settoon, Inc. or Settoon Construction, Inc.

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I.

OPINIONS BELOW

Petitioners, Settoon, Inc. and Settoon Construction, Inc. moved for partial summary judgment in the trial court seeking dismissal of the Jones Act seaman status claims of respondent, Michael Gros. The trial court granted their Motion for Partial Summary Judgment on November 22, 2002. (*App. 12-13*). Michael Gros applied for supervisory writs to the Louisiana Court of Appeal, Third Circuit, which granted the writ and reversed the state district court on December 23, 2003. *(App. 1-11)*. Petitioners then applied for writs to the Louisiana Supreme Court, which denied the writ application on March 26, 2004. (*App. 66*).

II.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered on December 23, 2003, by the Louisiana Court of Appeal, Third Circuit; the Louisiana Supreme Court denied discretionary review by order dated March 26, 2004. This Court has jurisdiction to review the judgment on a writ of certiorari pursuant to 28 U.S.C. § 1257.

III.

RELEVANT FEDERAL STATUTORY PROVISIONS

33 U.S.C. § 903 (*App. 67-69*).

33 U.S.C. § 904 (*App. 69*).

33 U.S.C. § 905 (*App. 69-71*).

46 U.S.C. § 688 (*App. 72-74*).

IV.

STATEMENT OF THE CASE

A. Factual Background

On or about March 1, 1996, plaintiff, Michael Gros was employed by Settoon Construction, Inc. as a truck driver/laborer when he allegedly injured his back while he and fellow co-workers were attempting to lift a heavy load temporarily on a flat deck work barge owned by Settoon Construction, Inc. As a result of this incident, Mr. Gros filed suit in 16th Judicial District Court, Parish of St. Martin, State of Louisiana and made claims of Jones Act negligence, unseaworthiness and maintenance and cure against defendants, Settoon Construction, Inc. and Settoon, Inc. ("Settoon"). Those claims stem from plaintiff's alleged status as a seaman. Plaintiff also brought a claim for vessel negligence against Settoon in its capacity as vessel owner and against the barge owned by it under LHWCA 33 U.S.C. § 905(b). (Plaintiff erroneously named Fred Settoon, Inc. as a defendant in his Original Petition which was subsequently cured by a Supplemental and Amending Petition naming the appropriate defendants). At the time plaintiff was prosecuting these claims, he was simultaneously asserting claims for LHWCA benefits through the U.S. Dept. of Labor as a result of the same accident, same facts and same injuries alleged in the state district court litigation. On April 9, 2001, a Decision and Order was issued by the District Director for the Department of Labor after a formal hearing on plaintiff's claim.

The Order awarded longshore benefits to Mr. Gros, and stated as follows:

> 1) Employer/carrier shall pay the claimant compensation for temporary total disability from March 1, 1996 and continuing, based on claimant's average weekly wage of $410.00. 33 U.S.C. § 908.

Decision and Order of District Director (*App. 64*).

The ALJ also made the following findings of fact pertaining to plaintiff's job history:

> According to the evidence presented to the record, plaintiff spent at least 5-10% of his time in a covered activity, a not insubstantial amount of his work on navigable waters, which was neither transient nor fortuitous. (*App. 53*).

Mr. Gros was therefore found to be a longshoreman under the LHWCA based on the above formal award issued by the Administrative Law Judge ("ALJ") for the Department of Labor.

B. Court Action

Mr. Gros filed suit in Louisiana state court on May 30, 1997 claiming he was entitled to seaman remedies. Settoon filed a Motion for Partial Summary Judgment seeking dismissal of plaintiff's causes of action for Jones Act negligence, unseaworthiness and maintenance and cure based on Mr. Gros' acceptance of a formal award of worker's compensation benefits pursuant to the Longshore and Harborworkers' Compensation Act. The state district court agreed with Settoon's argument and granted its Motion for Partial Summary Judgment which left Mr.

Gros with his § 905(b) claim for vessel negligence. (See *App. 12-13*, Final Judgment and trial transcript of Settoon's Motion for Partial Summary Judgment attached as *App. 14-25*).

Mr. Gros applied for supervisory writs to the Louisiana Court of Appeals, Third Circuit, which granted the writ and summarily reversed the district court on December 23, 2003. Petitioners-defendants applied for writs to the Louisiana Supreme Court, which declined review of the issue and denied the writ application on March 26, 2004.

V.

REASONS FOR ALLOWANCE OF WRIT

A. The Louisiana State Court Opinion Conflicts with Opinions of the United States Supreme Court and United States Fifth Circuit Court of Appeals

The below Louisiana court has decided an important question of law in a way that conflicts with a relevant decision of this Court and of a United States Court of Appeals.

In ***Southwest Marine, Inc. v. Gizoni***, 502 U.S. 81, 91, 112 S. Ct. 486, 493, 116 L. Ed. 2d 405 (1991), this court implicitly determined that a plaintiff's voluntary reception of a formal award of worker's compensation benefits under the LHWCA precludes him from pursuing seaman remedies. First, the ***Gizoni*** court found that it is appropriate to simultaneously pursue both seaman benefits and worker's compensation benefits under the LHWCA under

certain circumstances. This court also acknowledged that mere acceptance of voluntary payments under the LHWCA does not bar a worker from filing a Jones Act suit. However, and of utmost relevance to the instant case, the ***Gizoni*** court clearly implied that if a formal award of longshore benefits is awarded to a claimant, he may no longer pursue seaman remedies:

> It is by now "universally accepted" that an employee who receives voluntary payments under the LHWCA **without a formal award** is not barred from seeking relief under the Jones Act. This is so, quite obviously, because a question of coverage has never actually been litigated. Moreover, the LHWCA clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to employees for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA. ***Southwest Marine, Inc. v. Gizoni***, 502 U.S. 81, 91, 112 S. Ct. 486, 493, 116 L. Ed. 2d 405 (1991). (Emphasis ours).

A decision of the United States Fifth Circuit decided after ***Gizoni*** dealt directly with the question presently before this Honorable Court; namely what effect does a formal award of longshore worker's compensation benefits have on a claimant's right to pursue seaman remedies. In ***Sharp v. Johnson Bros. Corp.***, 973 F. 2d 423, 425-26 (5th Cir. 1992), cert. denied, 508 U.S. 907, 113 S. Ct. 2333; 124 L. Ed. 2d 245 (1993), the claimant was injured while performing bridge repair work from a barge. He filed a Jones Act suit in district court and an LHWCA claim with the Department of Labor. The parties later settled the LHWCA claim and the ALJ approved the settlement. Sharp continued to pursue his Jones Act claim for the

same injuries. On appeal, the Fifth Circuit held the settlement agreement approved by the ALJ constituted a "formal award" and plaintiff could no longer bring his Jones Act claim. In its reason for judgment, the ***Sharp*** court stated:

> Our holding is consistent with the purpose of the LHWCA, as outlined in ***Fontenot v. AWI, Inc.***, 923 F. 2d 1127 (5th Cir. 1991). LHWCA was not designed to create a mere safety net, guaranteeing workers a minimum award as they seek greater awards in court. Rather it has a benefit to employers, too, giving them limited and predictable liability in exchange for their giving up their ability to defend tort actions. *Id.* at 1132; (quoting ***Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs***, 461 U.S. 624, 636, 103 S. Ct. 2045, 2052, 76 L. Ed. 2d 194 (1983)). Permitting a Jones Act proceeding after a formal compensation award here would defeat the purpose of the LHWCA, as well as work on fairness, because, as here, employers often have different insurance carriers for worker's compensation claims and tort claims, so the compensation insurer, by guaranteeing a minimum award, necessarily would reduce the ability of the tort insurer to effect a settlement.

Id. at pages 426-27. The ***Sharp*** court also determined that their ruling was consistent with ***Gizoni***:

> Nor is our holding inconsistent with ***Gizoni***. In that case the court held that an injured maritime worker did not have to choose between pursuing his potential remedies under the LHWCA and the Jones Act. There is a difference, though, between saying a plaintiff may pursue only one

> remedy and declaring that he may receive only one award.
>
> We agree that Congress did not intend that a worker forfeit his right to pursue one remedy when he pursues another. Otherwise, a plaintiff might fail to receive a LHWCA award, because the ALJ considered him a seaman, but be barred from Jones Act relief because he pursued what he believes were his remedies under the LHWCA.
>
> Nor should an employer be able to avoid Jones Act liability by voluntarily paying LHWCA benefits that a needy worker cannot but accept while awaiting trial. . . . **But Congress did not intend that a worker be able to pick and choose his remedy based upon which has conferred upon him a larger award. That is, the LHWCA was not intended to be a "stepping stone on the way to a jury award".** ***Fontenot***, 923 F. 2d at 1133. (Emphasis ours).
>
> ***Id.***

Based on the foregoing logical interpretation of the ***Gizoni*** decision, it is clear that if an LHWCA claimant is issued a formal award of longshore benefits, the controlling law denies him access to seaman remedies. Here, the ALJ made a formal ruling that Mr. Gros was entitled to longshore benefits from March 1, 1996 to the date of the award plus continuing benefits. By specifically finding LHWCA "status", the ALJ's formal award clearly precludes plaintiff from asserting seaman claims in the present case. Accordingly, plaintiff's claims under Jones Act negligence, seaworthiness and maintenance and cure were rightfully dismissed by the trial court as it relied upon the most reasonable interpretation of the ***Gizoni*** opinion by the United States Fifth Circuit in the ***Sharp*** decision. This

Court should therefore grant writs to consider this matter that was wrongfully reversed by the Louisiana state appellate court.

B. A United States Court of Appeals Has Entered A Decision in Conflict with the Decision of Another United States Court of Appeals

The Louisiana appellate court, in eschewing the reasoning of the ***Sharp*** decision, relied upon two United States Ninth Circuit Court of Appeal cases in its reversal of the trial court's granting of Motion for Partial Summary Judgment on behalf of petitioners-defendants. First, it relied upon ***Papai v. Harbor Tug & Barge Co.***, 67 F. 3d 203 (9th Cir. 1995) for its holding that a claimant's receipt of benefits under the LHWCA does not preclude him from bringing a subsequent Jones Act suit and ***Figueroa v. Campbell Industries***, 45 F. 3d 311 (9th Cir. 1995), for its holding that an approved LHWCA settlement by an ALJ does not preclude a Jones Act claim. However, these decisions did not attach any significance to the issuance of a formal award of longshore benefits by an ALJ on a claimant's ability to subsequently pursue Jones Act remedies. Instead, they restricted the ***Gizoni*** opinion's scope to the fact issues inherent therein, namely, that there was no full adjudication of the LHWCA claim in that matter, therefore, there was no automatic preclusion of subsequent litigation under the Jones Act. ***Papai*** at 207 and ***Figueroa*** at 316. This interpretation completely ignores the statement by the ***Gizoni*** court concerning "It is by now universally accepted that an employee who receives voluntary payments under the LHWCA **without a formal award** is not barred from seeking relief under the Jones Act". ***Gizoni*** at 91. On the other hand, the ***Sharp*** decision

interpreted this statement in the more rational manner by giving a less strained meaning to the words of this Honorable Court. Consequently, there is a vast difference between the United States Fifth Circuit and Ninth Circuit Courts of Appeal on how they interpreted this court's opinion in ***Gizoni*** which gives rise to additional grounds for this Court's granting of petitioners' writ.

C. The Exclusive Remedy Provisions of the Longshore Harbor & Worker's Compensation Act Preclude Mr. Gros from Pursuing Seaman Status Remedies

33 U.S.C. § 903 of the Longshore and Harborworkers' Compensation Act provides as follows in pertinent part:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other worker's compensation law or § 688 of Title 46, Appendix (relating to recovery for injury to or death of seaman), shall be credited against any liability imposed by this Chapter.

33 U.S.C. § 904 provides the following:

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under §§ 907, 908, and 909 of this Title. . . .
>
> (b) Compensation shall be payable irrespective of fault as a cause for the injury.

33 U.S.C. § 905 provides in pertinent part:

(a) The liability of an employer prescribed in § 904 of this Title *shall be exclusive and in place of all other liability of such employer to the employee*, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or an admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action in law or in admiralty for damages on account of such injury or death. . . .

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of § 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection

> shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

Coverage under the Jones Act and coverage under the LHWCA § 901, et seq. of Title 33 are mutually exclusive. ***McDermott Int'l, Inc. v. Wilander***, 498 U.S. 337, 355, 111 S. Ct. 807, 817, 112 L. Ed. 2d 866 (1991); ***Southwest Marine, Inc. v. Gizoni***, 112 S. Ct. at 488.

The LHWCA provides a cause of action for injuries sustained by a broad range of land-based maritime workers, excluding seamen covered by the Jones Act. First, the LHWCA provides a no-fault worker's compensation scheme against a worker's employer for the death or disability of anyone engaged in maritime employment which entitles them to receive medical costs, pre-judgment interest and two-thirds (2/3) of the worker's salary for as long as the disability persists. Second, the LHWCA permits a restrictive theory of negligence against a vessel as a third party to recover damages caused by vessel negligence. Consequently, and in return for compelling the employer to pay compensation without proof of negligence, the Act provides a statutory scheme of benefits which are less than tort damages and grants the employer tort immunity, regardless of how serious the fault may have been. ***Becker v. Tidewater, Inc.***, 335 F. 3d 376, 387 (5th Cir. 2003); 33 U.S.C. 903-905; Schoenbaum; Admiralty & Maritime Law, 3d Ed. Vol. 1, pgs. 380-381.

Based on the above controlling law, a claimant such as Mr. Gros is limited to an award of longshore benefits under the circumstances presented in this case with the

exception of his 905(b) vessel negligence claim which remains. It is also evident that an underlying legislative reason of providing for the exclusive remedy of longshore benefits is to slam the door on other remedies with the exception of the § 905(b) claim. Otherwise, claimants would be able to utilize the resources of the Department of Labor as a "stepping stone on the way to a jury award". ***Sharp***, 973 F. 2d at 427. Further, worker's compensation schemes such as the LHWCA were established as a compromise between the rights of employers and employees. Such a system allows the employee to obtain benefits irrespective of fault while the employer enjoys a cap on damages. If Mr. Gros is allowed to pursue seaman status claims after he enjoys the benefits of a **formal award** of longshore benefits, he will not only have his proverbial cake but he will also be able to greedily consume it to the detriment of his employer. This was not the intended consequence of the legislative framework set up by the LHWCA. This conduct also violates principles of judicial economy as he already had a full and fair opportunity to prosecute all job status issues during his administrative hearing, including seaman status. This issue was examined by the ***Sharp*** court which stated:

> "It is true that LHWCA coverage was never litigated in an adversarial proceeding. But ***Sharp*** availed himself of the statutory machinery to bargain for an award, and he had the full opportunity to argue for or against coverage".

Sharp, supra, 973 F. 2d at 426. Likewise, Mr. Gros had the full opportunity to argue for or against coverage and chose LHWCA coverage, with the presentation of evidence which excluded Jones Act coverage. He should not be

allowed to relitigate the very same issue he previously resolved to his satisfaction.

This writ should therefore be granted by this Court for the foregoing reasons as this is an unresolved matter that is an important question of Federal law that should be settled by this Honorable Court.

D. The Doctrine of Collateral Estoppel Precludes Mr. Gros From Pursuing Jones Act Seaman Remedies

Alternatively, and concerning the second issue before the court for review, is whether the doctrine of collateral estoppel precludes Mr. Gros from seeking seaman status remedies. The ALJ for the U.S. Department of Labor made the following findings of fact pertaining to plaintiff's job history:

> "According to the evidence presented to the record, claimant spent at least 5-10% of his time in a covered activity, a 'not insubstantial' amount of his work on navigable waters, which was neither transient nor fortuitous". (*App. 53*).

Formulation of the seaman status test has been recently addressed and clarified by the United States Supreme Court. ***Chandris, Inc. v. Latsis***, 515 U.S. 347, 115 S. Ct. 2172, 2191, 132 L. Ed. 314 (1995). The court heavily emphasized in ***Chandris*** that a plaintiff must have a substantial connection to a vessel in navigation, or an identifiable fleet of vessels, "in terms of both its duration and its nature" in order to qualify as a seaman under the Jones Act. 115 S. Ct. at 2179. The court was careful to distinguish between land-based maritime workers injured while on vessels in navigation and traditional seamen. 115

S. Ct. at 2186. The court specifically emphasized that the Jones Act was only intended to protect sea-based maritime workers who "owe their allegiance to a vessel", and not "land-based employees, who do not". ***Chandris***, 115 S. Ct. at 2194. In doing so, the court has specifically rejected the "voyage test", 115 S. Ct. at 2187. The court has admonished lower courts not to employ "a snapshot test for seaman status, inspecting only the situation as it exists at the instant of the injury; a more enduring relationship is contemplated". ***Id.***

Giving effect to these guiding principles, the United States Supreme Court has determined that an appropriate rule of thumb is that a worker who spends less than approximately thirty percent (30%) of his time in the service of a vessel or fleet of vessels in navigation should not qualify as a seaman under the Jones Act. ***Chandris***, 115 S. Ct. at 2191, citing ***Barnett v. Chevron***, 781 F. 2d 1067, 1076 (5th Cir. 1987) and its progeny, ***Pamer v. Fayard Moving & Transportation Corp.***, 930 F. 2d 437, 439 (5th Cir. 1991); ***Lormand v. Superior Oil Co.***, 845 F. 2d 536, 541 (5th Cir. 1987). In such a case, summary judgment would be appropriate. ***Id.***

In the context of Mr. Gros' employment with Settoon, a factual determination was made by the above referenced Administrative Law Judge (ALJ) that plaintiff spent somewhere between 5-10% of his time working onboard a vessel on navigable waters. The doctrine of collateral estoppel, also called issue preclusion, therefore bars plaintiff from relitigating this fact issue in the instant litigation. ***McDonald v. Cason***, 801 So. 2d 1255, 1262, 2001-0932 (La. App. 3d Cir. 12/12/01). In light of plaintiff's work history, a truck driver/laborer, it is obvious that he cannot possibly meet the seaman status criteria as a

matter of law. Being temporarily on the deck of a work barge does not suffice.

In ***Anders v. Ormet Corp.***, 874 F. Supp. 738, 740-741 (M.D. La. 1994), the court upheld the ***Sharp*** court's ***Gizoni*** analysis. In ***Anders***, the ALJ ruled that claimant had previously been paid sufficient LHWCA benefits by his employer: "Such action by the ALJ is at least as much of a formal award as the settlement agreement entered into in ***Sharp v. Johnson Bros.***." ***Id.*** The ***Anders*** court also noted that the ***Sharp*** decision did not require the parties to litigate the issue of seaman status. In fact, the ***Anders*** court determined that the bestowing of a formal award by the ALJ was sufficient stating: "**In addition to meeting the requirement set out in *Gizoni***, the traditional requirements of collateral estoppel have also been met." (Emphasis added). ***Id.*** at 741. This holding was predicated on lesser facts than those presented in Mr. Gros' case.

Contrary to Mr. Gros' position, the United States Ninth Circuit Court of Appeal decisions cited by him actually acknowledge the relevance of the Doctrine of Collateral Estoppel to Mr. Gros' claims of seaman status. For instance, in ***Papai***, the court emphasized the following:

> "The distinction between ***Gizoni*** and the case at bar is that here plaintiff's LHWCA claim was fully adjudicated before the Administrative Law Judge who rendered a final decision. That the LHWCA claim was never actually litigated was a basis for the ***Gizoni*** court's holding that receipt of LHWCA benefits did not automatically preclude subsequent litigation under the Jones Act". . . .

67 F. 3d at 207.

Further, the ***Figueroa*** court stated:

> "Courts that have addressed the precise issue of whether the jurisdictional issue must be actually litigated for estoppel to apply in this situation have found that if the jurisdictional issue was not contested and no finding was made at the administrative level, a plaintiff is not estopped from bringing a Jones Act claim".

45 F. 3d at 316.

In the present case, the ALJ did make factual findings after presentation of the evidence concerning Mr. Gros' employment. Coverage under the LHWCA was expressly determined after being actively sought by Mr. Gros. Accordingly, the traditional requirements of collateral estoppel have been met as a result of the Administrative Law Judge's ruling concerning Mr. Gros' job history. The Doctrine of Collateral Estoppel applies. Mr. Gros is therefore precluded from seeking seaman status remedies under the controlling law submitted on behalf of both petitioners and respondent.

E. The Louisiana Appellate Court's Opinion Conflicts with an Opinion of this Court

During the course of Mr. Gros' hearing before the Department of Labor, he was provided ample opportunity to provide any and all information relevant to his work status. At the close of evidence, all information was considered by the Administrative Law Judge who made a specific finding of fact that Mr. Gros "spent somewhere between 5-10% of his time in navigable waters". (*App. 53*). Mr. Gros accepted the ALJ's decision in its entirety and thereby voluntarily chose to accept the formal award of

longshore benefits. Importantly, the findings of fact concerning his work status clearly indicate that Mr. Gros was not a seaman as the controlling law requires him to spend at least 30% of his time on vessels in navigable waters. ***Chandris***, ***supra***. The Louisiana appellate court's reversal of the trial court's judgment is therefore in direct conflict with the ***Chandris*** opinion, thus this Court should entertain petitioners' writ.

VI.

CONCLUSION

Based on all of the foregoing writ consideration reasons that are identified herein and established and delineated in Supreme Court Rule 10(a)-(c), this Court should grant a writ of certiorari in this matter and reverse the decision of the Louisiana Third Circuit Court of Appeal, and remand this matter to the state district court for further proceedings. Alternatively, this Court should reverse and render judgment in favor of petitioners, Settoon, Inc. and Settoon Construction, Inc., and remand to the district court for calculation of costs against Mr. Gros.

Respectfully submitted:

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03-461

MICHAEL GROS
VERSUS
FRED SETTOON, INC.

Judgment rendered **December 23, 2003**. Application for rehearing may be filed within the delays allowed by La. Code Civ. P. art. 2166 or La.Code Crim. P. art. 922.

* * *

APPEAL FROM THE
SIXTEENTH JUDICIAL DISTRICT COURT
PARISH OF ST. MARTIN, NO. 97-58097
HONORABLE KEITH J. COMEAUX, PRESIDING

* * *

SYLVIA R. COOKS
JUDGE

* * *

Court composed of Sylvia R. Cooks, John D. Saunders and Jimmie C. Peters, Judges.

REVERSED.

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COOKS, Judge.

Michael Gros, appeals the trial court's grant of partial summary judgment dismissing his Jones Act claims for negligence, unseaworthiness, and maintenance and cure because he received benefits under the Longshoreman's and Harbor Workers' Compensation Act (LHWCA), 33 USC 905(b). For the following reasons, we reverse.

FACTS AND PROCEDURAL HISTORY

On March 1, 1996, Michael Gros alleges he severely injured his back while in the employ of Settoon, Inc., and on assignment to Settoon Construction, Inc. Gros stated he injured his back while attempting to lift and hold up a heavy load while working on a barge owned by Settoon Construction, Inc. The barge allegedly shifted and rolled due to the weight and movement of the operation.

Alleging his status as a seaman, Gros subsequently made claims of negligence, unseaworthiness, and maintenance and cure against Settoon Construction under the Jones Act. Gros also filed a claim for vessel negligence against Settoon Construction in its capacity as a vessel owner under the Longshoreman's and Harbor Workers' Compensation Act (LHWCA), 33 USCS §905(B). Gros had previously received an award of benefits pursuant to the Longshoreman's and Harbor Workers' Compensation Act (LHWCA). At the hearing to determine Gros' entitlement to longshoreman's benefits, the employer argued Gros was a shore based worker entitled only to Louisiana Workers' Compensation Act, La.R.S. 23:1021, et seq., benefits and that his maritime employment was insufficient to qualify him for benefits under the LHWCA. The Administrative

Law Judge found Gros' injury upon navigable waters was sufficient to qualify him for benefits under the LHWCA.

The Defendants (Settoon, Inc. and Settoon Construction, Inc.) filed a motion for Partial Summary Judgment contending all of Gros' claims based on seaman status should be dismissed because of his voluntary receipt of LHWCA benefits. Gros argued the question of seaman status was never litigated during the trial for longshoreman's benefits, and therefore, he was entitled to a determination of his seaman status. The trial court granted the Defendant's partial motion for summary judgment and dismissed Gros' Jones Act claims for negligence, unseaworthiness, and maintenance and cure. The trial court, in oral reasons for judgment, stated:

> But without – I think the language in most of the cases say with a formal award [of LHWCA benefits], which we have in this particular case, I think I'm probably – the United States Supreme Court has indicated . . . he is precluded from advancing the seaman claim and I'm going to rule that way and grant the summary judgment.

Gros appeals the trial court's ruling.

ANALYSIS

In support of his argument that the trial court erred in granting defendant's partial motion for summary judgment, Gros directs this court to the Tulane Law Review comment, *The Overlap Preclusion Trap Between the Jones Act and the Longshore and Harbor Workers' Compensation Act*, 76 Tul.L.Rev. 783, by Victoria Holstein. That article notes the conflict currently existing among the federal circuits on whether a formal award of benefits

under the LHWCA precludes a subsequent Jones Act suit. The article proposes that the LHWCA does not mandate such a preclusive effect.

We are satisfied, during the administrative hearing to determine Gros' entitlement to LHWCA benefits, seaman status was not at issue. The administrative law judge dealt only with Gros' right to compensation under the Louisiana Workers' Compensation Act versus his right under the LHWCA.

Gros notes that any award to him as a Jones Act seaman would be reduced by the benefits paid to him under the LHWCA. Thus, there is no problem with double recovery and no basis for collateral estoppel exists.

In *Southwest Marine Inc. v. Gizoni,* 502 U.S. 81, 112 S.Ct. 486 (1991), a foreman for a ship repair operation sought and received *voluntarily* paid benefits under the LHWCA as a result of injuries he sustained while working on a floating platform owned by his employer. He later filed a Jones Act claim against the employer. The federal district court granted summary judgment because Gizoni was not a seaman and, as an enumerated worker under the LHWCA, he was precluded from bringing his action. The Ninth Circuit Court of Appeal reversed, holding Gizoni's status was an issue of fact and, because the LHWCA does not cover seaman, he might have been eligible for a Jones Act award. *Gizoni v. Southwest Marine, Inc.,* 909 F.2d 385 (9th Cir.1990).

The United States Supreme Court affirmed the Ninth Circuit ruling, holding the two statutory compensation regimes are mutually exclusive and that a maritime worker is limited to LHWCA remedies *only* if no genuine issue of fact exists as to whether he is a Jones Act seaman.

The court noted "[b]y its terms the LHWCA preserves the Jones Act remedy for vessel crewman, even if they are employed by a shipyard." *Southwest Marine,* 502 U.S. at 89. The Supreme Court emphasized the seaman status inquiry is fact-specific and is dependent upon the claimant's "employment-related connection to a vessel in navigation." *Id.* at 88. In rejecting the employer's argument that receipt of voluntarily paid LHWCA benefits precludes a subsequent claim under the Jones Act, the Court stated:

> It is by now "universally accepted" that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from seeking relief under the Jones Act. This is so, quite obviously, because the question of coverage has never actually been litigated. Moreover, the LHWCA clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA. (Citations omitted.)

Id. at 91-92.

In the aftermath of *Gizoni,* the federal circuits have split in their interpretation of the absence of prior litigation over seaman status and congressional intent underlying the LHWCA. The Fifth Circuit Court of Appeal in *Sharp v. Johnson Bros. Corp.,* 973 F.2d 423 (5th Cir.1992) limited *Gizoni's* application to cases involving voluntarily paid benefits.

In that case, Sharp was injured while repairing a railroad drawbridge from aboard a barge chartered by his employer. The employer voluntarily began paying Sharp

LHWCA benefits. Subsequently, Sharp filed a Jones Act suit. The employer then ceased paying LHWCA benefits, and Sharp filed a LHWCA claim. The employer raised the defense that Sharp was a Jones Act seaman and thus not eligible for LHWCA compensation.

The district court eventually granted a directed verdict against Sharp on his Jones Act claim on the grounds he was not a seaman. Sharp appealed that decision to the Fifth Circuit Court of Appeal. Prior to his appeal being heard, Sharp and his employer settled his LHWCA claim. A final release was executed and an administrative law judge approved the LHWCA settlement. The appellate court heard argument on the appeal of the directed verdict, and no one representing any of the parties mentioned the settlement. The Fifth Circuit reversed the district court, finding that a question of fact existed as to whether Sharp worked aboard a fleet of vessels and was therefore eligible for seaman status. *Sharp v. Johnson Bros. Corp.*, 917 F.2d 885 (5th Cir.1990).

The district court subsequently granted summary judgment against Sharp, holding as a result of the settlement he had elected his remedy and was precluded from filing suit based upon the Jones Act. Sharp appealed that decision. In affirming the district court's judgment, the Fifth Circuit held that an approved LHWCA settlement constituted a formal award that barred a Jones Act claim. The *Sharp* court reasoned as follows:

> It is beyond cavil that merely accepting voluntary payments under the LHWCA without a formal award does not bar a worker from filing a Jones Act suit. Here, though, Sharp obtained a settlement agreement and a compensation order

> issued by the ALJ. We have treated such an agreement and order as a "formal award."
>
> . . . .
>
> It is true that LHWCA coverage was never litigated in an adversarial proceeding. But Sharp availed himself of the statutory machinery to bargain for an award, and he had the full opportunity to argue for (or against) coverage.

Sharp, 973 F.2d at 426.

The *Sharp* court found that a claimant was not barred from seeking two remedies, but merely from receiving two awards, thus, imparting preclusive effect to the settlement did not violate the claimant's election of remedies. The court noted "[t]he LHWCA was not designed to create a mere safety net, guaranteeing workers a minimum award as they seek greater rewards in court." *Id.* at 427.

In conflict with the Fifth Circuit's approach in Sharp, the Ninth Circuit Court of Appeal held, in *Papai v. Harbor Tug and Barge Co.,* 67 F.3d 203 (9th Cir.1995), *rev'd on other grounds, Harbor Tug and Barge Co. v. Papai,* 520 U.S. 548, 117 S.Ct. 1535 (1997), that a claimant's receipt of benefits under the LHWCA, after a decision and order had been issued, did not preclude him from bringing a subsequent Jones Act suit. After noting the "universally accepted" maxim that an employee who receives *voluntary* payments under the LHWCA *without a formal award* is not precluded from seeking subsequent relief under the Jones Act, the *Papai* Court explained:

> The distinction between *Gizoni* and the case at bar is that here plaintiff's LHWCA claim was fully adjudicated before the ALJ who rendered a final decision. That the LHWCA claim was never

actually litigated was the basis for the *Gizoni* Court's holding that receipt of LHWCA benefits did not automatically preclude subsequent litigation under the Jones Act. However, the Court went on to recognize further support for its holding, which is applicable here: "Moreover, the LHWCA clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA" *Id.*, at 91-91, 112 S.Ct at 494. The Supreme Court further stated in a footnote addressing an equitable estoppel argument made by amicus brief, "[w]here full compensation credit removes the threat of double recovery, the critical element of detrimental reliance does not appear. [Citations omitted.] argument by amicus would force injured maritime workers to an election of remedies we do not believe Congress to have intended." *Id.*, at 92, n. 5, 112 S.Ct. at 494, n. 5.

In determining whether the prior litigation of plaintiff's LHWCA claim bars his subsequent Jones Act claim, we are mindful of the reasoning expressed by the *Gizoni* court and are further concerned with the fairness in imposing such a bar where it could work a disincentive on the part of the employer to vigorously litigate its defense in the LHWCA action. This is so because the parties are on the opposite sides of the seaman issue under the LHWCA as compared with their positions under the Jones Act. Furthermore, imposing such a bar would result in subjecting to suit an employer who immediately and voluntarily begins compensation payments while immunizing from suit an employer who forces his

> employee to seek compensation through litigation.
>
> . . . .
>
> Recognizing that a bar to relitigation would not serve the purpose for which it is usually employed since the parties are forced to take inconsistent positions under the Jones Act and the LHWCA and extending the reasoning of the *Gizoni* Court to the next logical step, we hold that plaintiff's litigation of his LHWCA claim does not bar his subsequent Jones Act claim.

Id. at 207-08.

In *Figueroa v. Campbell Industries,* 45 F.3d 311 (9th Cir.1995), a shipyard worker who sustained injury while working aboard his employer's boat, filed a Jones Act claim after receiving both LHWCA and state workers' compensation benefits. The Ninth Circuit held that an approved LHWCA settlement does not preclude a Jones Act claim because, "just as in *Gizoni,* the jurisdictional issue was not previously litigated, and no finding in that regard was made at the administrative level." *Id.* at 315. The *Figueroa* court specifically rejected the employer's argument that an approved settlement necessarily meant a "finding was implicitly made that Mr. Figueroa was 'not a member of a crew' and not a 'seaman,'" and thus, *Gizoni* did not apply. The *Figueroa* court noted that *Gizoni* emphasized that the justification for its decision was not that a formal award had not been issued, but rather that double recovery under the two statutes is precluded. Thus, the receipt of a LHWCA award, statutorily limited to compensation for medical expenses and lost wages, would not preclude a Jones act claim for pain and suffering. *Id.* at 316.

The three cases set forth above each present a different interpretation of the Supreme Court's opinion in *Gizoni.* The *Sharp* court essentially stated since *Gizoni* held a voluntary receipt of benefits would not bar a subsequent Jones Act claim, it would impliedly follow that a formal award of LHWCA benefits would bar a subsequent Jones Act claim. In *Figueroa,* the Ninth Circuit found the *Gizoni* decision hinged on the fact that double recovery was prevented by the credit provision in the LHWCA. It did not find relevant any distinction between the voluntary receipt of LHWCA benefits and a formal award. In *Papai,* the Ninth Circuit also held policy, legislative intent, and the wording of the LHWCA, overcame any requirement to impart preclusive effect to a final award of benefits.

We have thoroughly reviewed the jurisprudence and find no cases in Louisiana which have addressed the issue of whether a formal award of LHWCA benefits would preclude the filing of a Jones Act claim. After examining the above cited cases, we find the Ninth Circuit's decision in *Papai* the best interpretation of the Supreme Court's decision in *Gizoni,* the wording of the LHWCA and congressional intent. *Papai* concluded, and we agree, that Congress envisioned the pursuit of both LHWCA and Jones Act claims, and Congress took measure to prevent double recovery with the LHWCA's credit provision.

We do note, although the LHWCA credit provision does ostensibly prevent double recovery for the plaintiff, a real possibility exists that an employer may be forced to engage in repetitious litigation. Despite this possibility, it seems apparent to us that the credit provision of the LHWCA clearly indicates an intent on Congress' part to allow for recovery under both the LHWCA and the Jones

Act. Therefore, we reverse the trial court's judgment granting the employer's Motion for Partial Summary Judgment and dismissing Gros' Jones Act claims with prejudice.

The employer argues even if it is concluded that seaman status must be determined, in light of Gros' work history "it is obvious that he cannot possibly meet the seaman status criteria as a matter of law." In support of this assertion, the Defendants cite the administrative law judge's decision on LHWCA benefits wherein he stated "claimant spent at least 5-10% of his time in a covered activity, a 'not insubstantial' amount of his work on navigable waters." We find this argument without merit. The administrative law judge's opinion concerned only whether Gros was a covered worker under the LHWCA. The administrative law judge specifically stated Gros "spent *at least* five to ten percent of his time in a covered activity, *which is enough to invoke coverage under the Act.*" (Emphasis added). Gros' ability to prove seaman status under the Jones Act was not at issue.

DECREE

For the foregoing reasons, the judgment of the lower court granting the Motion for Partial Summary Judgment is reversed. All costs of this appeal are assessed against Settoon, Inc. and Settoon Construction, Inc.

REVERSED.

MICHAEL GROS	NUMBER: 58097 DIVISION: "E"
VERSUS	16TH JUDICIAL DISTRICT COURT
FRED SETTOON, INC.	PARISH OF ST. MARTIN
	STATE OF LOUISIANA

FILED: _____ _____
DEPUTY CLERK OF COURT

FINAL JUDGMENT

(Filed Nov. 18, 2002)

This matter came on for hearing on November 5, 2002, by agreement of counsel in Franklin, Louisiana on a Motion for Partial Summary Judgment filed by Settoon, Inc. and Settoon Construction, Inc. Present in court were: Daniel J. Nail, counsel for plaintiff, Michael Gros and Anthony F. Whitford, counsel for defendants. Before the Court is defendants', Settoon, Inc. and Settoon Construction, Inc., Motion for Partial Summary Judgment, asserting that all of plaintiff's claims based on seaman status should be dismissed due to his voluntary receipt of a formal award of worker's compensation benefits pursuant to the Longshore and Harborworkers' Compensation Act.

Plaintiff, Michael Gros, asserted that the question of seaman status was never litigated during the trial for longshoreman worker's compensation benefits and that he has, therefore, been denied his right to litigate seaman status under the Jones Act.

The Court, considering the Motion for Partial Summary Judgment submitted by defendants, the memorandum and affidavits in support thereof, and further considering the Opposition Memorandum submitted by plaintiff and attached affidavits and the arguments respective counsel;

IT IS ORDERED, ADJUDGED AND DECREED that there be and hereby is judgment granting a Motion for Partial Summary Judgment of Settoon, Inc. and Settoon Construction, Inc. and dismissing plaintiff's Jones Act, unseaworthiness and maintenance and cure claims with prejudice and at plaintiff's cost.

Considering that there is no just reason for further delay;

IT IS FURTHER ORDERED that this Partial Summary Judgment be designated a final judgment in accordance with Article 1915 B(1) of the Louisiana Code of Civil Procedure, 2002.

JUDGMENT READ, RENDERED AND SIGNED in St. Martinsville, Louisiana this 22 day of November, 2002.

/s/ K. Comeaux
JUDGE

RESPECTFULLY SUBMITTED:

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16TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF ST. MARTIN

MICHAEL GROS
VS. #58,097
FRED SETTOON

APPEARANCES:

Mr. Daniel Nail
ATTORNEY AT LAW
On Behalf of Plaintiff

Mr. Whitford
ATTORNEY AT LAW
On Behalf of Defendant

SUMMARY JUDGMENTS

November 5, 2002

(Heard in St. Mary Parish)

The Honorable Keith R.J. Comeaux, Judge Presiding

* * *

[7] mission been going on?

BY MR. NAIL: The mission, as I understand it, the affidavit of Shane Tatum indicates that he had been on the job in January and in February, two months.

BY THE COURT: Two months.

BY MR. NAIL: And in the case my client, Mr. Gros, he had been on the job almost two weeks.

BY THE COURT: Right. But between ten and fourteen days.

BY MR. NAIL: Before he was injured. And of course, because there was no more work for FAS he had to

go to work for the company Settoon Construction and after this job it's anybody's guess where he might have been able to go to work, or he may have been laid off, because that's uncertain.

BY THE COURT: I understand.

BY MR. NAIL: And of course, he was injured.

BY THE COURT: I was just trying to get all the facts straight in my head 'cause I think it's a fact sensitive issue, period, you know.

All right. Go ahead and make your argument.

BY MR. WHITFORD: All right. I'd like to take the Motion for Summary Judgment we filed on the formal award and what effect that has on –

[8] **BY THE COURT:** Uh-huh.

BY MR. WHITFORD: – on whether or not there's a pursuit of seaman –

BY THE COURT: Okay.

BY MR. WHITFORD: – remedies first, if that pleases the Court.

In that instance, Your Honor, I've submitted authority, a Fifth Circuit authority, and also the United Stated [sic] Supreme Court that clearly states that if Mr. Gros receives a formal award of longshore benefits, then the game's over. He cannot pursue seaman's remedies.

And it's very clear the only opposition to that was a Law Review article that was cited by my opponent in opposition to that, and that's clearly not authoritative, and

I'd ask the Court to follow what the United States Supreme Court have said on this very clearly.

BY THE COURT: All right. Mr. – let Mr. Nail argue that.

BY MR. NAIL: I would respond to that, sir. In writing a brief I am obligated to bring to the Court the current law on the subject whether it's a – the current law on the subject whether its entirely in my favor or not, and in so doing I found that Law Review article.

Now, because of that Law Review article addresses every single case on the question that has been published up through February the 2nd of this [9] year, I thought it appropriate to bring it to the Court's attention. And it says it so much more concisely than I ever could, particularly after it's been edited and, and commented on and corrected by the same law professors who perhaps started me off.

Under those circumstances I look at what the article had to say, not whether it was trying to persuade the Court to do or not to do, but rather the analysis that it made of the law. And it pointed out so clearly was this: none of the cases cited by the Supreme Court decisions, the Fifth Circuit decisions, none of them have ever addressed a case on these facts, particularly that is, in this particular case the employer advanced that Mr. Gros was covered under the Louisiana State Workman's Compensation statute, and not under the Longshore Act.

Well, Mr. Gros asserted that he could be, he was covered under the Longshore Act and it happens to be that certain general set of facts and circumstances that qualify him under both acts. That is to say, apply the facts of this case purely to a Jones Act question and he's a Jones Act

seaman. Apply the facts of this case to the question of whether he would have substantial maritime employment, whether or not his employer was engaged in maritime commerce and whether or not the accident happened on navigable waters of the United States aboard a vessel in navigation and you can find out that yes, he's also covered under the Longshore Act. That's what we refer to in this article, Law Review article, what was referred to as the trap. It's a situation where under both, under the set of facts of this case he can qualify [10] under either act if you apply the test under either act.

And so, the suggestion has been that the right to a determination of Jones Act status before a court of law is paramount, that an administrative determination of that matter, particularly without addressing the issue of whether or not he is a seaman, would not be preclusive.

Particularly said another way, all of the cases that were addressed had a, at issue, the question of whether he was a longshoreman or a Jones Act seaman. And that issue was determined in various other cases because it was before the court. In the single case where he, where a longshoreman entered into a compromise, well obviously he waives all claims at that point as against the employer. In that case he has clearly compromised his Jones Act claim.

In this case there has been no compromise whatsoever. The issue of Jones Act seaman status was never litigated. There can be no estoppel, there can be – estoppel, the argument is that, or it's clearly shown that longshore benefits of compensation and medical care and expense is tantamount to maintenance and cure under the Jones Act statue [sic] so that the employer is not

prejudiced by a determination that he should also be entitled to pursue his Jones Act claim for damages.

Now, so let me try to sum it up. The cases say that if he has compromised his claim as against his employer, then he cannot advance a Jones Act claim. However, if there has been no determination of the issue of Jones Act seaman status then he should still be entitled to pursue that. That's what we should, [11] that's what we're looking at. So, I can't say anymore about it.

BY MR. WHITFORD: I'd like to respond to that.

BY THE COURT: What's your response to that?

BY MR. WHITFORD: Judge, just to make sure we're clear I want to read directly from the United States Court, case –

BY THE COURT: Is it in your brief?

BY MR. WHITFORD: Yes. It's on page 2 of my rebuttal memorandum.

BY THE COURT: Let me get that. I think it's right here. All right.

BY MR. WHITFORD: All right. This is the language that the *Sharp* decision and the *Fontenot* decision that was cited – they're both United States Fifth Circuit cases – relied upon in making their decision. "It is by now a universally accepted that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act." So the necessary implication from that is that if there is a formal award like there is in this case, then you cannot pursue that remedy.

And then on the previous page of that rebuttal memorandum, Judge, there's a quotation near the bottom of the page about halfway down where it states, "Congress did not intend that a worker be able [12] to pick and choose his remedy based upon which is conferred upon him a larger award," which is exactly what's happening here. "That is the LHWCA was not intended to be a stepping stone on the way to a jury award."

These are clear statements. There's nothing that requires an adjudication of Jones Act seaman status when there's been a formal award. That's exactly what these courts are saying, and that, that cannot be refuted.

BY THE COURT: Mr. Nail, did your client pursue the Longshoreman and Harbor Worker's Compensation benefits?

BY MR. NAIL: Yes, he did

BY THE COURT: He filed a longshoreman claim in the longshoreman venue and asked for longshoreman benefits, correct?

BY MR. NAIL: That's correct.

BY THE COURT: And now you want, you want your cake and eat it too.

BY MR. NAIL: Yes, because no court has ever said –

BY THE COURT: Well, but, but the plaintiff has a choice of remedy. I mean if he thinks he's a seaman and he files for seaman status and he doesn't get seaman status, he's either found by a jury not to be a seaman, [13] or a judge on a directive verdict not to be a seaman or on a motion for summary judgment not to be a seaman, then he

always has the remedy of going back to the Longshoreman and Harbor Worker's Compensation benefits. I think he's not pretcommitted [sic] from doing that at that point or precluded that doing that at that point.

I tend to agree with Mr. Whitford. I think if you, you voluntarily seek Longshoreman and Harbor Worker's Compensation benefits, you're precluded from going after a seaman status unless you would abandon that claim at some point in time, and, and for some reason say, I was not, I was under a misinterpretation of the law, I was under misinterpretation of some fact and I now want seaman benefits because through discovery you find out something that may preclude you and then you enter into a formal withdrawal of your claim or something. But that hasn't happened in this case. And by the plaintiff voluntarily seeking Longshoreman and Harbor Worker's Compensation benefits, I think he's chose the remedy that he wants.

BY MR. NAIL: May I respond?

BY THE COURT: Sure.

BY MR. NAIL: That's what the last fifteen years of litigation is about, the question of whether or not the seaman, the Jones Act seaman has a right to judicial determination of his seaman status in a court of law before a jury. That's what it's all about, you see?

[14] **BY THE COURT:** Well, sure. But he doesn't have to choose longshoreman benefits first.

BY MR. NAIL: But precisely. That's what – if that were so clear any of the courts could have said that, but none of them have said that.

Instead, it's the, the outside of the circle, not trying to define what is inside the circle, not yet, and that's what the Law Review article is about, that Judge Tusony needs further explanation to define what's inside the circle, because what we have is a contest of whether or not, whether or not the administrative determination of claims under the Longshore is tantamount to and equivalent to the right of a trial by jury on seaman status under the Jones Act.

BY THE COURT: That's what the case says.

BY MR. NAIL: That's not what the case says, sir.

BY THE COURT: Well.

BY MR. NAIL: I just – I beg to argue with –

BY THE COURT: I understand that. I understand, Mr. . . . look I don't mind a lawyer advocating his position. But the key is, is that your client, and I don't know if you were the lawyer at the time or not, but the client, the claimant has the choice, and he files either a 905 B, he files a state Workman's Comp. claim or he files a [15] Jones Act, and claims seaman status. Now, he may not prevail in the Jones Act and you may have to file a, some type of a – I don't know if he'll be precluded depending on how long – how I don't know what the statute of limitations are on a Longshoreman and Harbor Worker's Compensation Act, but I would think that if you timely file a seaman claim, and then you do not prevail as a seaman, then I think you would have time to file a Longshoreman and Harbor Worker's Compensation claim, especially if the facts would fit. I haven't practiced that law when I was practicing but I remember it from law school with Frank Marist talking about it. And, and it just seems to me that

you have the choice to determine hey, Jones Act provides me the best remedy, the most award, the most money I can make, let me go get Jones Act first, and then if I lose, I go down to Harbor Worker, Longshoreman Harbor Worker's Compensation Act. And I just think that by doing it backwards you've supplanted that remedy of the seaman status by saying I'm going [sic] get longshoreman benefits, that's what I'm entitled to.

BY MR. NAIL: And the result of that type of thing would be that the claimant has to wait four years for his surgery to his back. That's what the law is trying to avoid, and that's why –

BY THE COURT: No, That's not right, because he has maintenance and cure, and cure would say he needs seaman –

BY MR. NAIL: [16] No. He can't have maintenance and cure until there's a jury trial on the issue of seaman status. That law changed.

BY THE COURT: Well, I understand that.

BY MR. NAIL: That's what has evolved from that.

BY THE COURT: I understand, but you can move for summary judgment –

BY MR. NAIL: You had –

BY THE COURT: – on the, on that status.

BY MR. NAIL: But then you don't have a, then you get to counter and you don't have jury determination.

BY THE COURT: No, but if you have a judge that says there's no question of fact and there shouldn't be a

jury on this, then I think you can ask for summary judgment just like he can ask for summary judgment that there is not fact.

BY MR. NAIL: For the record, may I relate please, that also the clear wording of the Supreme Court is that the Longshore Act was not intended to preclude the Jones Act seaman from bringing his case so that it wasn't necessary to elect remedies and that's what it's evolved to today, the question of whether it is in effect an election of remedies as the Court is apparently seeing now.

[17] **BY THE COURT:** All right. I want to go onto the next argument 'cause I want this all on the record. I want it all to go up if I decide that way.

BY MR. NAIL: Yes, sir.

BY THE COURT: I don't want to piecemeal it and have Mr. Nail coming back and forth.

BY MR. WHITFORD: All right. So, is it my understanding that we –

BY THE COURT: I'm not ruling on that yet.

BY MR. WHITFORD: All right.

BY THE COURT: Let's hear the rest of the argument, that way it's gonna all go up if I decide on summary judgment. One way or the other I'm going to make my reasons on everything.

SUMMARY JUDGMENT MOTION –
SEAMAN STATUS

BY MR. WHITFORD: All right. Your Honor, we have also filed a Motion for Summary Judgment on the

issue of whether or not there's actual seaman status here. And what we've submitted is the loads of cases showing that you have to have some type of a permanent attachment to the vessel that you're working on.

It's unquestioned that he was working on a

* * *

[45] occurred is a fact question and I think that should go to a jury.

However, I am going to grant the partial summary judgment on the exclusivity of remedy. I'm persuaded by Mr. Whitford's argument that it was, by him voluntarily electing to longshoreman benefits, and I understand the dilemma that the seaman is in, and I don't particularly like making this ruling, I think it penalizes that person whom we traditionally try to protect as a seaman, okay, by penalizing him to make a choice and, and election of remedies, especially in a situation when he is probably injured with little or not [sic] money coming in and we making him make a choice at that time without maybe all of the facts in from [sic] of him.

And a word to the wise of those who practice longshoreman benefits and also seaman law, you may want to take the suggestion of the Tulane Law Review and file the protective orders and ask for stays.

But without – I think the language in most of the cases say with a formal award, which we have in this particular case, I think I'm probably – the United States Supreme Court has indicated that I'm bond [sic] to bind that he is precluded from advancing the seaman claim and I'm going to rule that way and grant the summary judgment.

Now, having said that, gentlemen, I know y'all may need some time to digest all of this. What do y'all want to do on the trial date?

I think your 905 B action is still viable, but your seaman case is gone.

* * *

U.S. Department of Labor

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Issue date: 09Apr2001

CASE NO.: 2000-LHC-2179

OWCP NO.: 07-154141

IN THE MATTER OF

MICHAEL P. GROS,
Claimant

v.

FRED SETTOON, INC.,
Employer

and

LOUISIANA WORKERS'
COMPENSATION CORP.,
Carrier

APPEARANCES:

Daniel J. Nail, Esq.
On behalf of the Claimant

Patricia H. Wilton, Esq.
On behalf of the Employer and Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Michael P. Gros (Claimant), against Fred Settoon, Inc. (Employer) and Louisiana Workers' Compensation Corp. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before me on December 12, 2000, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced eight exhibits, all of which were admitted into evidence, (CX-1 to CX-8), including Dr. John D. Jackson's (Dr. Jackson) medical records and invoices; Dr. William Kinnard's (Dr. Kinnard) medical records; invoice from University Hospital; invoice from LSU Healthcare Network; invoice from Doctors Hospital of Jefferson; invoice from Neuro Medical Center; and, Claimant's October 19, 2000 deposition. Claimant's counsel submitted post-hearing evidence of a patient referral form from Dr. Jackson's office, which was identified as CX-9 and admitted into evidence.

Employer testified and introduced ten exhibits, all of which were admitted into evidence, (EX-1 to EX-10) including the notice of controversion; notice that compensation payments stopped; correspondence to Louisiana Workers' Compensation Corporation (LWCC) from Claimant's prior counsel, Miles A. Matt, dated September 9, 1996; Claimant's tax records; choice of physician forms; medical records and reports of Louisiana Brain and Spine

Clinic; medical records and reports of The Neuromedical Center; medical records and reports of Terrebonne General Medical Center; medical records and reports of Houma Orthopedic Clinic; and, medical records and reports of Culicchia Neurological Clinic, Employer/Carrier's counsel submitted post-hearing evidence of depositions from Melissa Vaughn and Russell Michiels, which were identified as EX-11 and EX-12 respectively and admitted into evidence.

Post-hearing briefs were filed by the parties[1]. Based upon the stipulations of the parties, the evidence introduced, my observation of the witnesses' demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

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[1] I left the record open to file supplemental briefs, as well as post-hearing briefs, to take depositions from Michiels and Vaughn concerning the issue of prior authorization for Dr. Jackson's evaluation and treatment, and to take depositions from William Aucoin concerning the alleged offer of suitable alternative employment (SAE), and from Dr. Kinnard concerning Claimant's medical limitations, and whether he requested prior authorization before referring Claimant to Dr. Jackson for neurological evaluation and treatment. However, both counsels tried to expand this and attempted to address other issues, such as causation, and/or present testimony by Vaughn and Michiels concerning SAE in their depositions and/or supplemental briefs. Similarly, Claimant's counsel requested to submit medical records that were not connected to a deposition. Upon agreement of Claimant's counsel and Employer's counsel I will consider the post-hearing medical evidence submitted by Claimant's counsel strictly to confirm Vaughn's testimony regarding prior authorization for treatment by Dr. Jackson and the date said request was made. In addition, I will consider testimony provided by Michiels and/or Vaughn concerning SAE as Aucoin's deposition was not taken. However, any other evidence that exceeded what was authorized, such as testimony concerning causation, is rejected.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1) and I find:

1. Claimant injured his lower back on March 1, 1996.
2. Claimant's injury was in the course and scope of his employment.
3. An Employer/Employee relationship existed at the time the accident.
4. Employer was timely advised of Claimant's injuries on March 4, 1996.
5. Controversion was filed on August 25, 1999 and September 3, 1999.
6. An informal conference was held in connection with this matter on April 18, 2000.
7. Average Weekly Wage is $410.00.
8. Employer/Carrier paid Claimant state compensation benefits from March 1, 1996 to January 28, 1997, 45 weeks, at $285.00 weekly, totaling $12,825.00.
9. Employer/Carrier paid medical benefits in the amount of $7,000.00 to date.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Jurisdiction.
2. Date of Maximum Medical Improvement (MMI).
3. Suitable Alternative Employment (SAE).

4. Claimant's entitlement to medical benefits for his treatment with Dr. John Jackson.

5. Attorney's fees and interest.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is a thirty-five year old male who completed the fourth grade and began working immediately upon leaving school at the age of fourteen. Claimant can read and write a little bit. (Tr. 24-25, 66). Prior to working for Employer, Claimant worked in the cane fields driving a tractor and truck and scrapping cane. Claimant began working as a laborer for Employer at age 23 in the Shell Oil Field in the Atchafalaya Basin. (Tr. 26-29). Often he had to take a boat through canals to get to the platforms upon which he worked with some of the platforms being on water and some on land. As a laborer, Claimant ran pipeline, demolished and loaded scrap metal on barges. (Tr. 29-32). He would then take the dismantled structures back over the Atchafalaya River to the dock, using a barge crane to load and offload the supplies.

Next Claimant drove dump trucks for Employer for about a year and a half, and then drove vacuum trucks to land locations and water locations. In his last job of vacuum truck driver Claimant drove a truck onto a barge for transportation to well sites in the Atchafalaya Basin. There he pumped residuals from tanks and then returned to land facilities where he drove his truck off the barge and transported the residuals to disposal wells. (Tr. 33-37, 71-73). When not involved in waste disposal Claimant hauled dirt for Employer, stacked pipe on barges, loaded

water and other equipment onto barges, and sometimes worked in the shipyard. (Tr. 38-41).

At the time of his injury, Claimant was detailed to a pipe-laying job, for about three weeks, putting concrete weights on a pipeline working from a pipe-laying barge and a smaller barge, which barges relocated about once weekly, on the navigable waters of the Atchafalaya Basin. (Tr. 92). Claimant also helped to load pipe onto the barge. (Tr. 42-50). It was in the final days of this job, on a Friday afternoon, that Claimant felt a sharp pain in his lower back while lifting pipeline weights. Claimant reported the injury to another employee, left the job-site by boat and returned home where he stayed in bed for four days. (Tr. 52,53). After convalescing for four days, Claimant attempted a return to work in the shipyard on Wednesday, but could not complete the work day due to back pain. (Tr. 54). He informed Wilbert Aucoin that he had hurt his back the prior Friday and completed an accident report with the assistance of Monique Settoon.

Claimant waited a couple of weeks to see a physician because it took that long to get an appointment with the first physician of his choice, Dr. William Fisher. (Tr. 55-58, 73). Claimant saw Dr. Fisher, a neurosurgeon, on just one occasion, which was paid for by Employer/Carrier. (EX-6). Concerning that visit, Dr. Fisher informed Claimant that it was in the nature of an examination and report with no authorization for tests, x-rays or treatment of any sort, and as such did not constitute a doctor/patient relationship and was designed for a single evaluation. (EX-6, p. 22).

Claimant presented to Dr. Fisher with low back pain, to the right of the midline, with burning and discomfort.

Claimant reported to Dr. Fisher his history of a work related back injury sustained in January 1995 while working for Employer and recounted the details of tests results in relation to that accident.[2] Dr. Fisher completed a neuromuscular examination of Claimant, the results of which were essentially normal. Dr. Fisher recommended that Claimant should be referred to another physician for diagnosis and treatment and recommended an MRI scan and possible physical therapy. Dr. Fisher opined that Claimant had likely suffered a lumbar strain.

On April 4, 1996 Claimant was examined by his family physician, Dr. Keith Landry (Dr. Landry), which was paid for by Employer. (Tr. 74-75). Dr. Landry diagnosed Claimant with significant muscle spasm in the paraspinous muscles of the lumbar region. Dr. Landry referred Claimant to Dr. Carson McKowen (Dr. McKowen) for an MRI and prescribed physical therapy. (EX-7, p. 6). Dr. McKowen examined Claimant that same day, on April 4, 1996, due to lumbar strain, finding no evidence of nerve root involvement and requested authorization for an MRI. (EX-7, p. 32).

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[2] Due to Claimant's January 1995 workplace accident, Dr. Landry ordered an MRI of the lumbar spine, which was completed on February 6, 1995 and indicated a one mm lesion circumferential bulge of the disc at L4-5 and a one point five by two cm benign non-fat containing hemangioma involving the L-3 vertebrae. Dr. Landry also ordered a bone scan, which was completed on February 22, 1995 and indicated mildly increased uptake seen overlying the right AC joint likely related to arthropathy and mild increased uptake overlying the right posterior parietal region of the skull, which was unlikely to be of clinical significance. (EX-6, pp. 20-21; EX-8, pp. 3, 5).

Dr. McKowen ordered an MRI and CT scan, which were completed on April 12, 1996 at Texas Diagnostic Imaging Centers. The MRI of Claimant's lumbar spine indicated a right posterolateral L-3 vertebral body and multilevel disc degeneration but no evidence of disc herniation and no nerve root compression. (EX-7, pp. 19-20).

On April 19, 1996, Dr. Landry examined Claimant again finding rigid muscle spasms, indicating a soft tissue injury of muscles and ligaments. Dr. Landry reviewed the MRI results and noted that Claimant had completed one week of physical therapy, ordering that Claimant continue physical therapy three times a week for three more weeks. Dr. Landry prescribed Norflex for pain. (EX-7, p. 7). On April 19, 1996, it was Dr. McKowen who actually wrote the order for Claimant's physical therapy. (EX-7, p. 29).

Claimant attended physical therapy at Pierre Part Physical Therapy with physical therapist Jenny Paine (Paine). Paine reported in a May 8, 1996 note to Dr. McKowen that Claimant attended physical therapy regularly per Dr. McKowen's referral. Claimant received icepacks, ultrasound, egs and exercises to his low back. Claimant reported to Paine that his pain was increasing and Claimant felt he was getting no better. (EX-7, p. 28).

On May 10, 1996, Claimant presented to Dr. Landry with complaints of swelling in the right flank, pain in the right leg and severe back pain. Dr. Landry found muscle spasm in the lumbar region. Dr. Landry referred Claimant for a urinalysis to rule out possible kidney problems, prescribed Soma, and recommended another opinion. (EX-7, p. 8).

On June 17, 1996, Employer referred Claimant to Dr. Robert Applebaum (Dr. Applebaum), who interviewed and examined Claimant on that date. Claimant presented with complaints of burning low back pain, and swelling in his right side, but denied any pain in his legs. (EX-10, p. 2-4). Dr. Applebaum recounted the details of Claimant's March 1, 1996 workplace injury and the treatment he received for such, as well as Claimant's prior injuries and the treatment received for such. Dr. Applebaum examined Claimant finding minimal mechanical findings and no neurological findings. He opined that Claimant did not have disease or damage involving the spinal cord or nerve roots, and from a neurological standpoint had reached MMI. He diagnosed claimant with low back pain of undetermined etiology, possibly related to the lesion in the L3 vertebral body. Dr. Applebaum recommended continued symptomatic treatment and an orthopedic evaluation in regard to a possible cyst and whether Claimant was able to return to work at that time.

On July 11, 1996, Claimant presented to Dr. Landry with continued pain in the lower back and right flank, as well as back pain which was prompted by pressing on Claimant's abdomen. Dr. Landry found muscle spasm in the in the [sic] lumbar region. Dr. Landry prescribed Flexeril for pain. (EX-7, p. 9). On July 22, 1996 a CT scan of Claimant's lumbar spine was completed at Thibodeaux Regional Medical Center, which indicated an L-3 vertebral cyst. Bloodwork was also completed on July 24, 1996 at Thibodeaux Hospital and Health Centers, which was essentially normal. On July 26, 1996, subsequent to completion of his CT scan and blood work, Dr. Landry examined Claimant, who presented with right-sided abdominal and flank pain. Dr. Landry opined that the

results of Claimant's bloodwork were essentially normal and his CT scan revealed a benign cyst on the right side of the vertebral body of L3, which Dr. Landry recommended be left alone. Dr. Landry recommended that Claimant see a surgeon due to the continued pain he experienced. (EX-7, p. 10).

Claimant saw Dr. McKowen again on August 27, 1996 upon referral from Dr. Landry and due to continued back paid. Dr. McKowen recommended that Claimant follow up with an orthopedic surgeon as he had nothing to offer Claimant but a prescription for Parafon Forte. Dr. McKowen also recommended a physical capacities evaluation, finding tightness in Claimant's paraspinous muscles of the lumbar region and possible symptom magnification. (EX-7, p. 11).

Claimant next requested to see Dr. Kinnard, an orthopedic surgeon, who examined Claimant on a few occasions, ultimately releasing Claimant from his care, saying that he had nothing to offer Claimant. (Tr. 58, 76). Dr. Kinnard first examined Claimant on September 27, 1996, finding evidence of ongoing pain with a coincidently lesion within the L3 vertebral body. (EX-9, p. 7). Dr. Kinnard ordered a bone scan of Claimant, which was completed on September 30, 1996 and indicated probable arthritic change in the right AC joint and a tiny focus of increased activity in the right posterior parietal skull of doubtful significance. (EX-8, p. 7).

On October 3, 1996, Dr. Kinnard examined Claimant again finding that he suffered from a lumbosacral strain. Dr. Kinnard ordered a progressive physical therapy program for pain relief and muscle strengthening. (EX-9, p. 4). Claimant saw Dr. Kinnard again on December 12,

1996 with continued complaints of burning sharp pain in the lower back and requested that Dr. Kinnard refer him to Dr. Jackson.

Dr. Kinnard scheduled an appointment with Dr. Jackson at Claimant's request per Claimant's request [sic]. (EX-9, p. 8). Dr. Kinnard, who was to contact Employer seeking approval for such referral apparently did not do so. (Tr. 78-80). Claimant did not personally seek authorization because he thought they would not pay for such care as they had stopped his compensation payments on January 28, 1997. (Tr. 84-86). In addition, in a January 28, 1997 letter to Employer/Carrier, Dr. Kinnard stated that he released Claimant to be able to return to work within the duties outline on the job description form. (Tr. 67-68; EX-9, p. 2; CX-3).

Claimant was informed that his compensation stopped because Dr. Kinnard had released Claimant to light duty work. (Tr. 83, 86-90). Conversely, Vaughn testified that Dr. Kinnard released Claimant to full duty and that Claimant was able to return to his regular duties as a truck driver. Vaughn testified that she faxed said full duty release to Claimant's attorney at that time, Miles Matt (Matt). (Tr. 90-92; EX-11, p. 14). Neither party submitted evidence to the record indicating whether Matt received said fax. Claimant was not informed that Employer had work available for him. (Tr. 137-38).

The full duty job description signed by Dr. Kinnard specified that Claimant could lift up to ten pounds. Claimant testified that as a truck driver he had to lift truck tires and rims, which weighed up to one hundred pounds and when he worked on the barges, he had to lift hoses up to fifty pounds and concrete blocks weighing one hundred

twenty pounds. On January 9, 1997, Dr. Kinnard signed a description of Claimant's job which indicated that Claimant: (1) had to sit for seven hours daily; (2) did not have to squat, crouch, crawl, reach above shoulder level or kneel; (3) had to occasionally bend, stoop, and climb; (4) had to frequently push/pull with the truck clutch; and, (5) was required to lift up to ten pounds. (CX-3). Carrier received the signed job description on January 30, 2997 [sic]. Dr. Kinnard never reviewed this job description with Claimant. Claimant has not worked for wages for anybody since March 1, 1996, the date of his injury. (Tr. 63). Since March 25, 1999, Claimant has been collecting social security, which is his sole source of income.

On February 4, 1997 Dr. Jackson's office contacted Vaughn, Employer's adjuster, requesting prior authorization to treat Claimant. (EX-11, pp. 14, 18; CX-9). Vaughn denied authorization for treatment by Dr. Jackson and testified that she would have never authorized Claimant to see another neurosurgeon because he had already seen three neurosurgeons by that time. (EX-11, p. 16; CX-9). Claimant's file was subsequently transferred to another adjuster, Russell Michiels (Michiels). (EX-11, p. 17).

On March 3, 1997 Claimant was examined by Dr. Jackson, a neurosurgeon. Claimant paid for the visit himself because Employer refused authorization. On August 18, 1997, Dr. Jackson issued a medical report stating that he reviewed the April 12, 1996 MRI scan of Claimant's back and found a possible small midline bulging disc at L5-S1 and at the L4-5 level there was a more circumscribed bulge of disc that tended to flatten the dura, but did not encroach onto the neural foramina, which were patent. (CX-2). Consequently, Dr. Jackson recommended a lumbar myelogram followed by a CT scan

to determine if Claimant had a disc pathology requiring surgery, but Employer would not approve said diagnostic procedures. (Tr. 59-61).

On February 4, 1998, Dr. Jackson issued a medical report stating that he received an MRI scan of Claimant's lumbar spine performed on January 10, 1998 at the Medical Center of Louisiana in New Orleans, which revealed early degeneration of the L2-3, 3-4, 4-5 disc spaces, with the L2-3 disc space being slightly narrowed. Dr. Jackson saw evidence of a hemangioma in the body of L3 and noted the L4-5 disc space to bulge appreciably and create a stenosis at one level. Also the ligamentum flavum were thickened at the level of stenosis so that the slight bulge of the disc with the ligamentum flavum caused constriction and narrowing of the caudal sac at one level at the L4-5 disc space. Consequently, Dr. Jackson continued to recommend a lumbar myelogram followed by a CT scan. (CX-2).

Dr. Jackson examined Claimant again on July 13, 1998, who presented with continued complaints of low back pain. Claimant had gone to Charity to the LSU Service, but the physicians there would not perform a myelogram or CT scan, as requested by Dr. Jackson. Claimant reportedly had another MRI scan performed at Charity, but Dr. Jackson did not see it. Dr. Jackson again recommended that Claimant have a myelogram and CT scan due to his bulging L4-5 disc, which Dr. Jackson opined had probably gotten worse. (CX-2).

On July 19, 1999, Dr. Jackson issued a medical report stating that he received Claimant's myelogram and CT scan done at Doctors Hospital on July 14, 1999. The myelogram revealed two degenerative discs, one ruptured

and one bulging. Dr. Jackson opined that this accounted for Claimant's complaints of pain in the low back and lower extremity. Dr. Jackson noted that Claimant had gotten quite depressed due to his physical problems and had gone to the emergency room several times for pain medication to give him relief. Dr. Jackson recommended surgery to provide probable permanent relief and rehabilitation for Claimant, which surgery has yet to be performed due to Employer's lack of approval. (CX-2).

In a June 29, 2000 letter to Employer/Carrier, Dr. Kinnard stated that he had reviewed the lumbar myelogram with an enhanced CT scan performed on Claimant on June 14, 1999 and found that Claimant had evidence of a lumbar disc herniation and a nerve root cutoff on the right at L4-5. Dr. Kinnard stated in the letter that he found the treatment recommended by Dr. Jackson, surgery, appropriate for Claimant's diagnosis, disc herniation. (EX-9, p. 1; Tr. 62-63, 67, 96).

B. Claimant's Testimony Concerning Pain

Claimant recounted the facts of his workplace injury and the treatment he received for said injury. (Tr. 23). Since March 1, 1996, the date of his injury, Claimant is no longer able to complete many activities without pain. He can mow the yard with a riding mower, sitting on an eight inch cushion and operating the mower in the slowest gear possible. (Tr. 63-64). Claimant assist [sic] with light cooking and housework. Claimant is able to fish for spans of four to five hours to pass the time, as long as he is able to periodically get up and change positions. (Tr. 81-82). Claimant testified that he could do any other activity for four to five hours a day, as long as he is able to change

positions and keep himself comfortable and not put himself in an awkward position that would cause a furtherance of his pain.

Nonetheless, Claimant suffers from burning sensations, sharp pain, and swelling in his back. He also suffers from numbness and burning sensations in his legs from the knee to the foot if he walks too long, sits too long or lays [sic] down too long. (Tr. 84-85). At the time of the hearing, Claimant had a busted lip because his legs had given out on him a few days prior while brushing his teeth and he fell head first into the tub. A couple of months after injuring his back, Claimant began having trouble with his abdomen and is now on panic disorder medication. (Tr. 65-67).

C. Testimony of Claimant Witness, Shayne Tatum

Shayne Tatum (Tatum) also worked for Employer at the same time as Claimant and testified concerning Claimant's workplace activities and injury subject to the instant claim. (Tr. 98-102). Tatum drove trucks and worked on the pipeline alongside Claimant. Thus, Tatum testified corroborating Claimant's testimony about Employer's workplace environment. Tatum testified that he traveled back and forth to Employer's worksite on a motorboat. Also corroborating Claimant's testimony, Tatum testified that they had to lift concrete blocks weighing one hundred twenty-five pounds and truck rims and tires that weighed about eighty pounds. They also had to lift and change truck batteries and handle eight twenty foot sections of hose, with each twenty foot section weighing about thirty to forty pounds.

Concerning Claimant's workplace accident, which is the subject of the instant claim, Tatum was on the deck of the "big barge," about thirty to forty feet away from Claimant when he witnessed Claimant grabbing his back when Claimant had an accident on the deck of the "small barge," suffering a back injury. (Tr. 104-06). Corroborating Claimant's testimony, Tatum testified that he witnessed such events late in the work day.

D. Testimony of Claimant Witness, Lynwood Aucoin

Lynwood Aucoin (Aucoin) worked for Employer at the same time as Claimant as a welder. Aucion testified concerning Claimant's workplace activities and injury subject to the instant claim. (Tr. 110-11). Aucoin gave Claimant a ride home from work on March 1, 1996 and Claimant reported to Aucoin during that trip that he had hurt his back that day lifting a hoist at work.

E. Testimony of Employer Witness, Greg Anthony Gravois

Greg Anthony Gravois (Gravois) worked for Employer as a foreman in direct supervision over Claimant. (Tr. 113-19). Gravois testified that Claimant spent about ninety to ninety five percent of his working time on the land driving trucks, leaving five to ten percent of the time to have been spent by Claimant over water. Gravois testified that Employer had work available for Claimant as a truck driver in December 1996, when Dr. Kinnard released Claimant to drive trucks. Gravois further testified that he thought Employer would have "found something" that could have accommodated any difficulties or limitations Claimant may have had.

F. Testimony of Employer Witness, Fred Settoon

Fred Settoon (Settoon) was the owner of Fred Settoon, Inc., at the time of Claimant's March 1, 1996 workplace accident. (Tr. 125). Settoon testified that Claimant spent ninety five percent of his time driving vacuum trucks on land for Employer. (Tr. 126). Settoon testified that two to three times a year Claimant would make a trip onto a barge to vacuum out tanks for Employer. Settoon later testified that about once a month Claimant would drive his truck onto a barge and the barge would take him to a platform, and working from the barge, Claimant would vacuum out the tanks. (Tr. 134-36). Settoon testified that Claimant had been assigned to do pipeline work several times in the past, as well as the pipeline job that Claimant was assigned to, which has been subject of the instant claim and March 1, 1996 workplace injury suffered by Claimant. (Tr. 127-30). Settoon further testified that the pipeline job that Claimant was working when he was injured on March 1, 1996 lasted about two weeks, and not three weeks as presented by Claimant and Tatum.

Settoon testified that following Dr. Kinnard's release of Claimant, Wilbert Aucoin informed Claimant that Employer had truck driving work available for him. (Tr. 131). Settoon testified that if Claimant had returned to work driving trucks and had a back injury, Employer would have assigned someone to help Claimant with the truck. The alleged employment offer was not confirmed by a letter to Claimant.

G. Testimony of Employer Witness, Melissa Vaughn

Melissa Vaughn (Vaughn), Employer's adjustor originally assigned to Claimant's compensation claim, was

deposed on February 23, 2001 by Claimant's counsel, Daniel J. Nail, and Employer's counsel, Patricia H. Wilton. Vaughn testified that by the time Claimant's claim was reported to her, Claimant had already chosen to see Dr. Fisher, a neurosurgeon at the NeuroMedical Center. (EX-11, pp. 5-8). Claimant next saw Dr. Keith Landry, a general practitioner of Claimant's choosing. Claimant next completed a choice of physician form, choosing to see Dr. McKowen, a neurosurgeon. (EX-5). Employer then sent Claimant to Dr. Applebaum, a neurosurgeon, for a second opinion. Claimant subsequently completed a choice of physician form, choosing to see Dr. William Kinnard, an orthopedic. (EX-11, p. 9).

Vaughn testified that Dr. Kinnard released Claimant to full duty and that Claimant was able to return to his regular duties as a truck driver. Employer filled out a job description form indicating the alleged nature of Claimant's duties as a truck driver, which form Dr. Kinnard signed. (EX-11, pp. 10, 12). The full duty description reflected that Claimant would not have to lift more than ten pounds, and Vaughn admitted that if the position required Claimant to lift more than ten pounds, he could not perform the work. (EX-11, p. 18). Vaughn testified that she faxed said full duty release to Claimant's attorney at that time, Matt. (EX-11, p. 14). Vaughn described the position available as light duty, when by her own admission the position was full duty and involved Claimant's regular duties as a truck driver. (EX-11, pp. 11-12). Vaughn testified that she does not remember why she described the position as light duty because it was her understanding that Claimant had been released to return to his regular work, as noted on the full duty job description form.

Vaughn testified that upon Claimant's request, Dr. Kinnard referred Claimant to Dr. Jackson for treatment and Vaughn subsequently received a request from Dr. Jackson's office to treat Claimant. (EX-11, pp. 14, 18). Vaughn denied authorization for treatment by Dr. Jackson and testified that she would have never authorized Claimant to see another neurosurgeon because he had already seen three neurosurgeons by that time. (EX-11, p. 16). Vaughn does not recall if Dr. Jackson's office made such a request prior to treating Claimant. (EX-11, pp. 18-20). Claimant's file was subsequently transferred to another adjuster, Russell Michiel's (Michiels). (EX-11, p. 17).

H. Testimony of Employer Witness, Russell Michiels

Michiels, Employer's senior claims representative assigned to Claimant's case in April 1998, was deposed on February 23, 2001 by Claimant's counsel, Daniel J. Nail, and Employer's counsel, Patricia H. Wilton. (EX-12, p. 5). Michiels testified that when he received Claimant's file his compensation had already been stopped based on medical documentation that Claimant had been released to work. Michiels testified that Dr. Jackson was an unauthorized physician because Claimant had already had his choice of four physicians and no one contacted Vaughn for authorization for treatment by Dr. Jackson. (EX-12, pp. 6, 15). After Claimant's file was assigned to Michiels, Claimant's attorney contacted Michiels requesting that Claimant be reimbursed for treatment administered by Dr. Jackson and for authorization that Claimant receive further treatment from Dr. Jackson. (EX-12, pp. 6-8, 17).

Michiels testified that Dr. Kinnard referred Claimant to Dr. Jackson for treatment based upon Claimant's

request to do so. (EX-12, pp. 9-12). Michiels testified that Dr. Kinnard had released Claimant to return to work at his regular job and that Vaughn faxed Claimant's then attorney, Matt, a note offering Claimant his regular position with Employer. Subsequent to the April 18, 2000, informal conference concerning the instant matter, Michiels requested that Claimant return to see Dr. Kinnard. Upon that examination, Dr. Kinnard concluded that he agreed with the diagnosis that Dr. Jackson made, that surgery was recommended. Furthermore, Michiels admitted that no physician prior to Dr. Jackson completed a myelogram, a basis form of examination for diagnostic purposes and a test often completed for the purpose of determining whether one has a herniated disk. (EX-12, pp. 14-16).

Contentions of the Parties

Claimant asserted that: (1) jurisdiction existed under the Act, thus he had maritime status at the time of his March 1, 1996 workplace accident, and SAE was not established, thus Claimant is due temporary total disability from the date of his accident to the present and continuing; (2) Claimant is entitled to reimbursement for all expenses incurred in seeking medical attention from Dr. Jackson to date because he sought prior authorization from Employer, who refused to provide the requested medical treatment, which was reasonable and necessary, and further, Claimant is entitled to all reasonable and necessary future medical expenses for treatment of his back injury by, or at the direction of, Dr. Jackson under Section 7 of the Act; and (3) Claimant is entitled to interest and attorney's fees.

Employer/Carrier asserted that: (1) Claimant did not have maritime status at the time of his March 1, 1996 workplace injury, thus jurisdiction is lacking and Claimant is not entitled to benefits under the Act; (2) if jurisdiction does exist, Claimant's reached MMI as of December 12, 1996, based on a report by Dr. Kinnard, as a result of whatever injuries he sustained while working for Employer in March 1996, was released to his position as a truck driver, and Employer had such a position available, at the same rate of pay, which was offered to Claimant; (3) Employer further contends that Claimant is not due medical benefits for his treatment with Dr. Jackson as the [sic] there was no prior request for authorization or approval to change physicians to Dr. Jackson before the initial evaluation and subsequent treatment was conducted.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion, *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 Sect. 2251 (1994), *aff'g*, 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the

credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).

A. Jurisdiction

When Congress overhauled the Act in 1972 it expanded both the term "employee" and the concept of coverage. Section 902(3) was amended to read as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 903(a) was amended to read as follows:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way,

> marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . .

As a result of these amendments it has become clear that in order for a claimant to be coverage [sic] under the Act as amended in 1972, they must satisfy both a "status" and "situs" test. In *Herb's Welding, Inc. v. Gray* 470 U.S. 416 (1985), 105 U.S. 1421 at 1423 (1985) the Supreme Court stated:

> The Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et. seq.*, provided compensation for the death or disability of any person engagd in "maritime employment," § 902(3) if the disability or death results from an injury incurred upon navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing or building a vessel § 903(a). Thus a worker claiming under the Act must satisfy both a "status" and a "situs test"

The term "situs" has been broadly interpreted to include land not contiguous to navigable water provided among other things that the site is suitable for maritime purposes and proximate to or close as possible given all circumstances navigable waterway. In *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980), the Fifth Circuit at 513-514, in defining what an adjoining area was, stated:

> The situs requirement compels a factual determination that cannot be hedged by the labels placed on an area. . . . Just as we disapprove of a test that disposes of the question based totally on the presence of intervening or surrounding

> maritime facilities, we also reject the idea that Congress intended to substitute for the shoreline another hard line. Growing ports are not hemmed in by fence lines; the Act's coverage should not be either. All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes. We would not extend coverage in this case to downtown Houston. The site must have some nexus with the waterfront.
>
> Although "adjoin" can be defined as "contiguous to" or "to border upon," it also is defined as "to be close to" or "to be near". "Adjoining can mean "neighboring." to instill in the term is broader meaning is in keeping with the spirit of the congressional purposes. So long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the LHWCA.

Later the Fifth Circuit in *Texports* at 515 stated "area" is defined by its function, *i.e.*, it must be customarily, but not exclusively used by an employer to load, unload, repair or build a vessel. In addition, the Fifth Circuit has stated that the area to be examined is the place of injury and its relationship to navigable waters. *Jacksonville Shipyards v. Perdue*, 539 F.2d 535 (5th Cir. 1976) *vacated and remanded on other grounds*, 433 U .S> 904 (1977). *See Nelson v. Gray F. Athinson Construction Co.* 29 BRBS 39 (1995); *Brown v. Bath Iron Works Corp.*, 22 BRBS 384, 389 (1989); *Davis v. Dovan Co. of California*, 20 BRBS 121 (1987) *aff'd mem.* 865 F.2d 1257 (4th Cir. 1989); *Lasofsky v. Arthur J. Trickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.* 853 F.2d 919 (3rd Cir. 1988).

Employer does not contest its maritime situs in that Claimant was on navigable waters when he was injured. Employer, however contends that the status requirement was not met. For the reasons set forth below, I do not agree, but rather find that the status requirement under the Act have been met.

There is no legislative definition of "maritime employment." Cong.Rec.S11623 Sept. 20, 1984. As such, this aspect of the Act has been left to the courts to define. The Board has held, in an unpublished opinion, that when a worker is injured on actual navigable waters while in the course of his employment of those waters, he is a maritime employee under Section 2(3). The Board stated, "[r]egardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision." *Griffin v. McLean Contracting Co.*, 32 BRBS 87 (1998). Again, also in dicta, the Board in *Griffin* stated that, "injury on actual waters is sufficient to establish coverage under both sections 2(3) and 3(a) of the Act." *Id.* This holding is based on the Board's interpretation of a Supreme Court holding that the 1972 Amendments to the Act did not disclose any Congressional intent to withdraw coverage from those workers injured on navigable waters in the course of their employment who would have been covered by the Act before 1972. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297 (1983).

Status is an occupational test requiring an examination of the character of the work to see whether the employee's activities bear a significant relationship to traditional maritime activity. Status may be determined either upon the maritime nature of Claimant's activity at

the time of his injury or upon the maritime nature of his employment as a whole. *Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 781 (1982); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S. Ct. 2820. The first alternative is referred to as the "moment of injury" test while the second alternative requires only that the claimant spend "some" portion of his overall employment performing maritime activities. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. at 273, 97 S. Ct. at 2362, *P.C. Pfeiffer Co. v. Ford*, 444 U.S. at 812, 100 S. Ct. at 337; *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346 (5th Cir. 1980); *See also Lennon v. Waterfront Transport*, 20 F.3d 658 (5th Cir. 1994). Although an employee is covered if some portion of his activities constitute covered employment, those activities must be more than "episodic, momentary or incidental to non-maritime work." *Boudloche*, 632 F.2d at 1346.

In *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999) (*en banc*), the Fifth Circuit held that a worker who is aboard a vessel either transiently or fortuitously, even though technically in [sic] course of his employment, does not enjoy coverage under the Act. The court declined to set an exact amount of work performance on navigable waters sufficient to trigger coverage under the Act, instead leaving that task to case-by-case development. The court did, however, state that a "worker injured on the [navigable] water and who performs a "not insubstantial" amount of his work on navigable waters is neither transient nor fortuitous." The court went on to state that the threshold amount must be greater than a modicum of activity in order to preclude coverage to those employees who are merely commuting from shore to work by boat. Also, the routine activity of assisting in tying the vessel to the dock

and loading or unloading one's tools and personal gear onto the vessel do not count as meaningful job responsibilities.

"[I]n *Parker v. Motor Boat Sales*, 314 U.S. 244 (1941), one of the Supreme Court cases on which the *Bienvenu* Court relied, the Court held that a janitor who was killed in an accident while accompanying a salesman [co-worker] during a demonstration of a motor boat was covered under the Act. The Court reasoned that habitual performance of other duties on land did not alter the fact that at the time of the accident the employee was riding in a boat on navigable water, and cited Section 2(4) of the Act, which provides for its application to 'employees [who] are employed . . . in whole or in part upon the navigable waters of the United States.'" *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1989) *citing Id.*, 314 U.S. at 247; *see* 33 U.S.C. § 902(4) (1994).

In *Megoey v. Chiquita Brands International*, 30 BRBS 237 (1997), the Board held that the Administrative Law Judge's finding that claimant spent three to five percent of his time in a covered activity alone was enough to invoke coverage under *Caputo* and *Boudloche*, *citing Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993). The Fifth Circuit has summarized its rule stating "a claimant will meet the status requirement of the Act, not only if he is engaged in maritime employment at the time of injury, but also if he spends some portion of his overall employment engaged in maritime activities." *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750 at 755 (1981). In *Hullinghorst*, the Fifth Circuit noted that it was clear that the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lied within the

scope of "maritime employment" as that term was used in the Act. *See also Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991).

Similarly, in the instant case, Claimant spent at least five to ten percent of his time in a covered activity, which is enough to invoke coverage under the Act. Although Employer's counsel argued in their post-hearing brief that Claimant's work activity on the water during the duration of his employment with Employer was something less than five percent of his total work time, that is contrary to the testimony provided by Employer. Gravois indicated that Claimant spent five to ten percent of his time performing work activities over water. Settoon, the owner of Employer's business, testified that Claimant spent ninety five percent of his time driving vacuum trucks on land for Employer, leaving the other five percent to have been spent performing work activities over water. (Tr. 126). Notably, Settoon later testified that about once a month Claimant would drive his truck onto a barge and the barge would take him to a platform, and working from the barge, Claimant would vacuum out the tanks. (Tr. 134-36). Settoon testified that Claimant [sic] been assigned to do pipeline work several times in the past, as well as the pipeline job that Claimant was assigned to, which has been the subject of the instant claim and March 1, 1996 workplace injury suffered by Claimant, which activity clearly lied within the scope of "maritime employment" as that term was used in the Act. (Tr. 127-30). According to the evidence presented to the record, Claimant spent at least five to ten percent of his time in a covered activity, a 'not insubstantial' amount of his work on navigable waters, which was neither transient nor fortuitous. *Bienvenu*, 164 F.3d 901.

B. Claimant's Prima Facie Case, Nature and Extent of Disability and Suitable Alternative Employment

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a) (emphasis added).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). These two elements establish a *prima facie* case of a compensable "injury" supporting a claim for compensation. *Id.*

Once Claimant's *prima facie* case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and

the working conditions which could have cause [sic] them. The burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that Claimant's employment did not cause, contribute to or aggravate his condition. *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *E & L Transport Co. v. N.I.R.B.*, 85 F.3d 1258 (7th Cir. 1996).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The presumption is not rebutted merely by suggesting an alternative way that Claimant's injury may have occurred. *Williams v. Chevron, USA*, 12 BRBS 95 (1980). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. *Hampton v. Bethichem Steel Corp.*, 24 BRBS 141,

* * *

661 F.2d at 1042; *P&M Crane*, 930 F.2d at 430.

If the employer meets its burden by establishing SAE, the burden shifts to the claimant to prove reasonable diligence in attempting to secure some type of SAE shown within the compass of opportunities, by the employer, to be reasonably attainable and available. *Turner*, 661 F.2d at 1043. Termed simply, the claimant must prove a diligent search and the willingness to work. *Applebaum v. Halter Marine Serv.*, 19 BRBS 248 (1987). Moreover, if the

claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). If the claimant fails to satisfy this "complementary burden," there cannot be a finding of total and permanent disability under the Act. *Turner*, 661 F.2d at 1043; *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Employer argued that Claimant was released to his regular duties as a truck driver by Dr. Kinnard, and that Employer had such a position available, at the same rate of pay, which was offered to Claimant, thus establishing SAE. The record contains a full duty job description, signed by Dr. Kinnard, that did not comport with Claimant's actual workplace duties as presented in credible testimony by Claimant and Tatum. Vaughn testified that Dr. Kinnard released Claimant to full duty and that Claimant was able to return to his regular duties as a truck driver. Employer filled out a job description form indicating the alleged nature of Claimant's duties as a truck driver, which form Dr. Kinnard signed. (EX-11, pp. 10, 12). The full duty description reflected that Claimant would not have to lift more than ten pounds, and Vaughn admitted that if the position required Claimant to lift more than ten pounds, he could not perform the work. (EX-11, p. 18).

Claimant testified that as a truck driver he had to lift truck tires and rims, which weighed up to one hundred pounds and when he worked on the barges, he had to lift hoses up to fifty pounds and concrete blocks weighing one hundred twenty pounds. I find Claimant's testimony to be

credible and corroborated by Tatum's testimony. Vaughn testified that she does not remember why she described the position as light duty because it was her understanding that Claimant had been released to return to his regular work, as noted on the full duty job description form. I find that the testimony presented by Employer/Carrier was not credible and the position allegedly available did not comport to the restrictions set forth by Dr. Kinnard. Furthermore, there was no evidence to confirm that a job offer was in fact made and Employer failed to show the presence of any SAE.

Accordingly, based on the foregoing I find that: (1) Claimant clearly could not perform his past work for Employer; (2) Employer failed to show SAE; (3) Claimant never reached MMI in that he still needs surgery to correct his back condition. Thus, Claimant is entitled to temporary total disability compensation benefits from March 1, 1996 and continuing, based on his average weekly wage of $410.00.

E. Entitlement to Medical Care and Benefits

Pursuant to Section 7(a) of the Act, 33 U.S.C. § 907(a), Employer is responsible for reasonable and necessary medical expenses that are related to Claimant's compensable injury. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979); *Pardee v. Army & Air Force Exchange Serv.*, 13 BRBS 1130 (1981). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258

(1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee*, 13 BRBS at 1130; *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, but not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'g* 12 BRBS 65 (1980). Furthermore an employee's right to select his own physician, pursuant to section 7(b), is well settled. *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (*per curiam*), *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Brothers Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding*, 15 BRBS 299 (1983).

Consent to change physicians *shall* be given when the employee's initial free choice was not of a specialist whose services are necessary for, and appropriate to, proper care and treatment. Consent may be given in other cases upon a showing of good cause for change. *Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780, 786, 16 BRBS 44 (CRT) (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982). The regulation only states that an employer *may* authorize a change for good cause; it is not *required* to authorize a change for this reason. *Swain*, 14 BRBS at 665.

Once the employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek employer's approval. *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988). The claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury, in order to be entitled to such treatment at the employer's expense. *Rieche v. Tracor Marine*, 16 BRBS 272 (1984); *Wheeler v. Interocean Stevedoring*, 21 BRBS 33 (1988). The employee need not request treatment when such a request would be futile. *Shell v. Teledyne Movable Offshore*, 14 BRBS 585, 590 n.2 (1981).

Section 7(d)(2) of the Act provides in pertinent part that:

> (2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so.

33 U.S.C. § 907(d)(2).

An employer's physician's statement that the employee is recovered and discharged from treatment may be tantamount to the employer's refusing to provide treatment. *Shahady*, 682 F.2d at 970; *Walker v. AAF Exch. Serv.*, 5 BRBS 500 (1977); *Buckhaults v. Shippers Stevedore Co.*, 2 BRBS 277 (1975), as may be testimony by employer's physicians at the hearing opposing the treatment request, *Atlantic & Gulf Stevedores v. Neuman*, 440

F.2d 908 (5th Cir. 1971), a mistaken diagnosis, *Cooper Stevedoring v. Washington*, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977), *aff'g* 3 BRBS 474 (1976); *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986); *McGuire v. John T. Clark & Son, Inc.*, 14 BRBS 298 (1981), or employer's physician urging that the employee return to work. *Rivera v. National Metal & Steel Corp.*, 16 BRBS 135 (1984). Where an employer's physician's actions constitute a refusal of treatment, the employee is justified in seeking treatment elsewhere, without the employer's authorization, and is entitled to reimbursement for necessary treatment subsequently procured on his own. *Matthews*, 18 BRBS at 189; *Rivera*, 16 BRBS at 138.

As discussed above, jurisdiction existed and Claimant's March 1, 1996 workplace injury was sustained in the course and scope of his employment. I find that Claimant's first choice of physicians, Dr. Fisher, was not in fact a treating physician because Dr. Fisher specifically informed Claimant that the visit was in the nature of an examination and report with no authorization for tests, x-rays or treatment of any sort, and as such did not constitute a doctor/patient relationship and was designed for a single evaluation. (EX-6, p. 22). Claimant next chose to see his family physician, Dr. Keith Landry, which was paid for by Employer. (Tr. 74-75). Dr. Landry referred Claimant to Dr. McKowen for treatment. (EX-7, p. 6).

Upon Employer's request, Claimant next submitted to an examination by Dr. Applebaum. Dr. Applebaum recommended continued symptomatic treatment and an orthopedic evaluation in regard to possible cyst and whether Claimant was able to return to work at that time. On July 26, 1996, subsequent to completion of his CT scan and blood work, Dr. Landry examined Claimant and

recommended that Claimant see a surgeon due to the continued pain he experienced. (EX-7, p. 10).

Claimant saw Dr. McKowen again on August 27, 1996, upon referral from Dr. Landry, and due to continued back pain. Dr. McKowen recommended that Claimant follow up with an orthopedic surgeon as he had nothing to offer Claimant but a prescription for Parafon Forte. (EX-7, p. 11).

Claimant next requested to see Dr. Kinnard, an orthopedic surgeon, who examined Claimant on a few occasions, ultimately releasing Claimant from his care, saying that he had nothing to offer Claimant. (Tr. 58, 76). After being informed that Drs. McKowen and Kinnard had nothing further to offer him, and due to continued pain, Claimant requested a referral from Dr. Kinnard to Dr. Jackson, which referral Dr. Kinnard made.

On February 4, 1997 Dr. Jackson's office contacted Vaughn, Employer's adjuster, requesting prior authorization to treat Claimant. (EX-11, pp. 14, 18; CX-9). Vaughn denied authorization for treatment by Dr. Jackson and testified that she would have never authorized Claimant to see another neurosurgeon because he had already seen three neurosurgeons by that time. (EX-11, p. 16; CX-9).

On March 3, 1997 Claimant was examined by Dr. Jackson. After Dr. Jackson reviewed the April 12, 1996 MRI scan of Claimant's back he recommended a lumbar myelogram followed by a CT scan to determine if Claimant had a disc pathology requiring surgery, but Employer would not approve said diagnostic procedures. (Tr. 59-61; CX-2). Dr. Jackson continued to treat Claimant and recommend a lumbar myelogram followed by a CT scan

due to Claimant's bulging L4-5 disc, which Dr. Jackson opined had probably gotten worse. (CX-2).

On July 19, 1999, Dr. Jackson issued a medical report based on Claimant's myelogram and CT scan done at Doctors Hospital on July 14, 1999. The myelogram revealed two degenerative discs, one ruptured and one bulging. Dr. Jackson opined that this accounted for Claimant's complaints of pain in the low back and lower extremity. Dr. Jackson recommended surgery to provide probable permanent relief and rehabilitation for Claimant, which surgery has yet to be performed due to Employer's lack of approval. (CX-2). Furthermore, as reviewed above, after reviewing the myelogram and CT scan, Dr. Kinnard agreed with Dr. Jackson, finding the treatment recommended by Dr. Jackson, surgery, appropriate for Claimant's diagnosis, disc herniation. (EX-9, p. 1; Tr. 62-63, 67, 96). Yet, Employer refused to provide treatment as required by the Act.

As established by the record, including the medical evidence as presented by Drs. Kinnard and Jackson, the treatment procured by Claimant from Dr. Jackson was necessary for treatment of his injury, thus satisfying Claimant's duty under the Act. Consequently, Claimant is entitled to reimbursement of expenses incurred in the treatment of his back injury by Dr. Jackson and additional medical treatment, including surgery by Dr. Jackson, associated with his March 1, 1996 workplace accident under Section 7 of the Act.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six

per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that " . . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . " *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et. al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

V. [sic] ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties

have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VI. [sic] ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from March 1, 1996 and continuing, based on Claimant's average weekly wage of $410.00. 33 U.S.C. § 908.

2. Employer/Carrier shall receive a credit for state compensation benefits paid from March 1, 1996 to January 28, 1997, 45 weeks, at $285.00 weekly totaling $12,825.00.

3. Employer/Carrier is responsible for reimbursement of expenses incurred in the treatment of Claimant's back by Dr. Jackson, and future medical treatment for Claimant's back by Dr. Jackson, including but not limited to surgery, under Section 7 of the Act.

4. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 9TH day of April, of 2001, at Metairie, Louisiana.

/s/ Clement J. Kennington
CLEMENT J. KENNINGTON
Administrative Law Judge

The Supreme Court of the State of Louisiana

MICHAEL GROS NO. 2004-C-0235

VS.

FRED SETTOON, INC.

IN RE: Settoon Construction, Inc.; Settoon, Inc.; – Defendant(s); Applying for Writ of Certiorari and/or Review, Parish of St. Martin, 16th Judicial District Court Div. E, Nos. 97-58097; to the Court of Appeal, Third Circuit, No. 03-461

March 26, 2004

Denied.

JLW

PFC

CDK

BJJ

JPV

JTK

TRAYLOR, J., would grant the writ.

Supreme Court of Louisiana
March 26, 2001

/s/ Rai K., Daigle
Deputy Clerk of Court
For the Court

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33 U.S.C.A. § 903

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

(b) Governmental officers and employees

No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

(c) Intoxication; willful intention to kill

No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(d) Small vessels

(1) No compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary, the facility is engaged in the business of building, repairing, or dismantling exclusively small vessels (as defined in paragraph (3) of this subsection), unless the

injury occurs while upon the navigable waters of the United States or while upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels.

(2) Notwithstanding paragraph (1), compensation shall be payable to an employee –

> **(A)** who is employed at a facility which is used in the business of building, repairing, or dismantling small vessels if such facility receives Federal maritime subsidies; or
>
> **(B)** if the employee is not subject to coverage under a State workers' compensation law.

(3) For purposes of this subsection, a small vessel means –

> **(A)** a commercial barge which is under 900 lightship displacement tons; or
>
> **(B)** a commercial tugboat, towboat, crew boat, supply boat, fishing vessel, or other work vessel which is under 1,600 tons gross as measured under section 14502 of title 46, United States Code, or an alternate tonnage measured under section 14302 of that title as prescribed by the Secretary under section 14104 of that title.

(e) Credit for benefits paid under other laws

Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of Title 46, Appendix (relating to recovery for

injury to or death of seamen), shall be credited against any liability imposed by this chapter.

Current through P.L. 108-234, approved May 28, 2004

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33 U.S.C.A. § 904

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

Current through P.L. 108-234, approved May 28, 2004

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33 U.S.C.A. § 905

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such

injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in

whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

(c) Outer Continental Shelf

In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this Act by virtue of section 1333 of Title 43, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

Current through P.L. 108-234, approved May 28, 2004

46 U.S.C. Sec. 688. – Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any **seaman** who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any **seaman** as a result of any such personal injury the personal representative of such **seaman** may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1)

No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred –

(A)

while that person was in the employ of an enterprise engaged in the exploration,

development, or production of offshore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by

(a)

in bulk in the cargo spaces; and

(B)

in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2)

The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person –

(A)

under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B)

under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency

[1] vessel constructed or adapted primarily to carry oil

[1] So in original. Probably should be "a".

Supreme Court, U.S.
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(2)

No. 03-1699

IN THE
SUPREME COURT OF THE UNITED STATES

FRED SETTOON, INC., ET AL.
Petitioners,
v.
MICHAEL GROS,
Respondent.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal, Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether a compensation order awarding benefits for a worker's injury under the Longshore and Harbor Workers' Compensation Act, without addressing whether the worker was a "member of the crew of [a] vessel" excluded from the Act's "coverage," forecloses the worker from asserting in a proceeding under the Jones Act and general maritime law that he *was* a "crew member."

2. Whether the ALJ who decided Gros's Longshore Act claim made a potentially preclusive finding that Gros's work aboard vessels during some relevant period amounted to no more than ten percent of his work time.

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32B Am.Jur.2d *Federal Employers' Liability and Compensation Acts* § 53 17

Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* (2d ed. 1975) 12

Victoria L.C. Holstein, Comment, *The Overlap Preclusion Trap Between the Jones Act and the Longshore and Harbor Workers' Compensation Act*, 76 Tul. L. Rev. 783 (2002) 21

Arthur Larson & Rex K. Larson, *Law of Workers' Compensation* 12

2 Martin J. Norris, *Law of Seamen* (5th ed. 2003) 2, 8

Restatement (Second) of Judgments § 28(5)(c) (1982).....22

David W. Robertson, *The Supreme Court's Approach to Determining Seaman Status: Discerning the Law Amid Loose Language and Catchphrases*, 34 J. Mar. L. & Comm. 547 (2003) 7

1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6-29 (4th ed. 2004) 8

John R. Wagner, Jr., *Applicability of Jones Act (46 U.S.C. [App.] 688) to Workers Connected with Operations of Dredges, Drilling Platforms, Derricks, or Similar Special-Purpose Equipment*, 92 A.L.R. Fed. 733 (1989 & 2004 Supp.) 7

IN THE
SUPREME COURT OF THE UNITED STATES

FRED SETTOON, INC., ET AL.
Petitioners,
v.
MICHAEL GROS,
Respondent.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal, Third Circuit

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BRIEF ROR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Order of the Louisiana Supreme Court denying discretionary review (Pet. App. 66) is reported at 871 So.2d 372. The opinion of the Louisiana Court of Appeal for the Third Circuit (Pet. App. 1-11) is reported at 865 So.2d 143. The order of the 16th Judicial District Court of Louisiana dismissing Plaintiff-Respondent Gros's seaman's claims, and designating that partial summary judgment a "final judgment" under La. Code Civ. Proc. Ann. art. 1915.B(1) (Pet. App. 12-13), is unreported.

The decision and order of the administrative law judge making an award in the Longshore Act proceedings (Pet. App.26-65) is unreported, but is available at the Department

of Labor's website at http://www.oalj.dol.gov/DMSSearch-/CaseDetails.cfm?CaseId=198484.

JURISDICTION

The Order of the Louisiana Supreme Court was entered on March 26, 2004 (Pet. App. 66). The petition for a writ of certiorari was filed on June 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT

1. The Jones Act, 46 U.S.C. App. § 688, provides a "seaman" injured in the course of his or her employment with a negligence cause of action against the employer. Injured seamen are also entitled under the maritime common law, among other remedies, to recover damages for "unseaworthiness" – unfitness of the vessel, her appurtenances, her staffing, and even her operational practices. *E.g.*, 2 Martin J. Norris, *Law of Seamen* §§ 27.4-.16 (5th ed. 2003).

The Longshore and Harbor Workers' Compensation Act[1] imposes no-fault liability on the employer, for medical benefits and for periodic benefits for disability or death of an "employee" that results from an injury occurring "upon the navigable waters of the United States" (as extended to include certain shoreside areas). Longshore Act §§ 3(a), 7-9, 33 U.S.C. §§ 903(a), 907-909. As a general proposition, the Longshore Act forecloses tort remedies against an insured employer, and also recovery from a vessel owner or operator (whether or not it is the employer) based on "unseaworthiness," for injuries within its coverage. *Id.* § 5(a), (b), 33 U.S.C. § 905(a), (b). It leaves the employer subject to tort liability for a covered injury only in the event the employer is

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[1] Act of Mar. 4, 1927, c. 509, 44 Stat. 1424, *as amended*, 33 U.S.C. §§ 901-50 ("Longshore Act").

also the owner or operator of the vessel aboard which the injury occurred, and was negligent in that capacity. *Id.* §§ 2(21), 5(b); *Jones & Laughlin Steel Co. v. Pfeifer*, 462 U.S. 523, 528-32 (1983).

The Act excludes from its "coverage," however, any "master or member of the crew of any vessel." Longshore Act § 2(3)(G), 33 U.S.C. § 902(3)(G). That exclusion thus preserves for crew members, in lieu of the Act's compensation remedy and limited right of recovery for "vessel" negligence, the otherwise available remedies under general maritime law and the Jones Act. *See generally McDermott, Inc. v. Wilander*, 498 U.S. 337, 347 (1991).

2. Respondent Michael Gros sustained a serious back injury on March 1, 1996, in the course of employment for Settoon Construction, Inc., aboard one of two Settoon Construction barges engaged in a pipelaying project on the navigable waters of the Atchafalaya Basin, within the state of Louisiana. Pet. App. 2, 30-31, 53. The workers'-compensation insurer of his payroll employer, Settoon, Inc., paid him compensation (and authorized limited medical attention at its expense) for some eleven months under the Louisiana Workers' Compensation Act, La. R.S. §§ 23:1031 *et seq.* Gros filed suit in Louisiana state court, asserting causes of action for maintenance and cure and for damages for negligence under the Jones Act or on the ground that the barge was "unseaworthy" – remedies dependent on his assertion that he was working as a member of the crew of the pipelaying barges at the time of the injury. In the alternative, he claimed damages for vessel negligence under § 5(b) of the Longshore Act. Gros also filed an administrative claim for benefits under the Longshore Act. Petitioner Settoon contested his status as a crew member in the tort action, and contested his status as a "maritime employee" within the coverage of the Longshore Act (*see* Longshore Act § 2(3), 33 U.S.C. § 902(3)) with respect to his compensation claim.

3. Gros's Longshore Act claim came before a Department of Labor administrative law judge ("ALJ") for hearing in December 2000 (Pet. App. 27), and the ALJ issued a "compensation order" (Longshore Act § 19(e), 33 U.S.C. § 919(e)) awarding compensation and medical benefits under the Act in April 2001 (Pet. App. 26-65). Settoon contended before the ALJ that Gros's injury was not within the Act's coverage because, although the injury occurred on navigable waters, Gros was not "engaged in maritime employment" within the meaning of Longshore Act § 2(3), 33 U.S.C. § 902(3). Pet. App. 46.[2] Even accepting without discussion or analysis the employer's focus on the portion of Gros's work performed aboard vessels during the entire "duration of his employment with [Settoon, Inc.]," the ALJ determined that he "spent at least five to ten percent of his time in . . . covered activit[ies], a 'not insubstantial' amount of his work on navigable waters, which was neither transient nor fortuitous," and hence *was* "engaged in maritime employment" within § 2(3). Pet. App. 53. Accordingly, after resolving other contested issues in Gros's favor, the ALJ awarded continuing compensation for temporary total disability from the date of the injury (subject to credit for the compensation paid pursuant to state law) and medical benefits. Pet. App. 64. At no point in the Longshore Act proceedings did Settoon assert that, even if Gros's employment was "maritime" within the meaning of the Act, still he was excluded from the Act as a "member of the crew of [a] vessel," Longshore Act § 2(3)(G), and the ALJ did not consider that question.

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[2] Settoon also contested whether Gros had suffered any residual back condition or consequent disability related to the injury beyond ten months after the injury, and whether he was entitled to payment of his medical expenses for treatment by one of his doctors thereafter (Pet. App. 46). The ALJ found in Gros's favor on those issues (Pet. App. 54-62), and Settoon did not appeal those findings.

4. Settoon Construction then moved the state trial court for partial summary judgment dismissing Gros's crew-member causes of action, i.e., all his claims except the one for vessel negligence under Longshore Act § 5(b), based on the ALJ's award of Longshore Act benefits. In November 2002, the court granted the motion, accepting Settoon's argument that by virtue of the entry of a formal award of benefits under the Longshore Act, Gros had "elect[ed]" the Longshore Act remedy to the exclusion of seamen's remedies otherwise potentially available to him (Pet. App. 24), and designated the partial summary judgment "final" for purposes of review. Pet. App. 12-13.[3]

On Gros's appeal, the Louisiana Court of Appeal, Third Circuit, reversed. Pet. App. 1-11. It described a conflict between authorities of the federal courts of appeals for the Fifth and Ninth Circuits on the effect of a formal award under the Longshore Act on an injured worker's continued right to seek remedies available to a crew member, and found the Ninth Circuit's reasoning more persuasive. It therefore held that on grounds of "policy, legislative intent, and the wording of the Longshore Act," an award under the Longshore Act does not *per se* affect the worker's right to a determination in a tort action of his assertion that he was a crew member. Pet. App. 10. The court of appeal further rejected Settoon's contention that the ALJ's findings establish that Gros lacked crew-member status as a matter of law because he did not spend at least thirty percent of his work time aboard a vessel or fleet of vessels:

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[3] Settoon also moved the trial court for summary judgment that, on the merits, the evidence showed that Gros lacked crew-member status as a matter of law and that there was no Longshore Act § 5(b) negligence; the trial court separately denied that motion, and did *not* declare that judgment "final" for appeal, so it was not reviewable in advance of full resolution of the case (La. Code Civ. Proc. Ann. art. 968).

> The [ALJ] specifically stated Gros spent '*at least* five to ten percent of his time in a covered activity, *which is enough to invoke coverage under the Act.*' [Pet. App. 53] (Emphasis added). Gros'[s] ability to prove seaman status under the Jones Act was not at issue.

Pet. App. 11.

The state supreme court denied Settoon's application for certiorari by a six-to-one vote. Pet. App. 66.

REASONS FOR DENIAL OF THE WRIT

I. Although the Issue of Federal Law on which Petitioners Seek Review Is the Subject of an Intercircuit Conflict and of an Intracircuit Conflict Between Federal and State Appellate Courts, This Is Not an Appropriate Time or Case for Its Resolution.

A. Scope of the Recurring Issue

It is now well-settled that the respective coverages of the Longshore Act and the Jones Act are mutually exclusive, because any worker whose injury *is* within the scope of the Longshore Act is generally foreclosed from tort remedies against the employer, except for that based on the employer's negligence in its capacity as owner or operator of a "vessel" that is asserted to have caused the injury, Longshore Act § 5(a), (b). *E.g.*, *McDermott, Inc. v. Wilander*, 498 U.S. 331, 347-48 (1991). It is likewise settled that the operative statutory phrase that defines the applicability of the Jones Act (and the availability of other "seamen's remedies") is "master or member of the crew of any vessel," Longshore Act § 2(3)(G) – a category that would be included in the Longshore Act's general definition of a covered "employee" as one who is "engaged in maritime employment," *id.* § 2(3), but that is

excluded from the definition, and the Act, by the crew-member exception. *E.g.*, *Wilander*, *supra*.

Despite this Court's recent attention to the question what legal content should be given to the phrase "member of the crew of any vessel,"[4] a substantial "twilight zone"[5] persists in which it is difficult to predict in advance of the conclusion of litigation whether a worker injured while working aboard a vessel is a crew member entitled to "seamen's" remedies (generally the remedies at issue here – "maintenance and cure" and recovery of full compensatory damages based on Jones Act negligence or "unseaworthiness") or a non-crew-member maritime employee restricted to limited workers-compensation remedies and Longshore Act § 5(b) negligence recovery. *See generally*, *e.g.*, John R. Wagner, Jr., *Applicability of Jones Act (46 U.S.C. [App.] 688) to Workers Connected with Operations of Dredges, Drilling Platforms, Derricks, or Similar Special-Purpose Equipment*, 92 A.L.R. Fed. 733 (1989 & 2004 Supp.); David W. Robertson, *The Supreme Court's Approach to Determining Seaman Status: Discerning the Law Amid Loose Language and Catchphrases*, 34 J. Mar. L. & Comm. 547 (2003).

Whenever an admitted, disabling injury to such an "ambiguous amphibious worker"[6] occurs aboard a vessel owned

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[4] *McDermott, Inc. v. Wilander*, 498 U.S. 331 (1991); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); *Chandris, Inc. v. Latsis*, 515 U.S 347 (1995); *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997).

[5] This Court originally applied this phrase to a range of situations of *constitutional* uncertainty about the authority of the states to apply their workers'-compensation laws to injuries otherwise subject to maritime tort law. *Davis v. Department of Labor & Industries*, 317 U.S. 249, 256 (1942); *id.* at 262 (Stone, J., dissenting). It is here used in its common sense of an area of uncertainty along the border between two alternatively applicable bodies of law.

[6] Judge John R. Brown coined the phrase in *Mike Hooks, Inc. v. Pena*, 313 F.2d 696, 697 (5th Cir. 1963), and it has been used frequently since, particularly by the Fifth Circuit.

by the employer, it is clear that the worker is entitled to some remedy without proof of fault, intended to be provided without delay. It is not clear, however, whether such entitlement is in the form of wages to the end of the contract period as well as "maintenance and cure" until maximum medical recovery is reached (if he or she *is* a crew member),[7] or instead in the form of periodic benefits for disability and medical care by the worker's choice of physician under the Longshore Act. It is likewise clear that he or she has a further right to sue the employer for full compensatory damages (subject to credit for the payments previously provided), but it is not clear what grounds of liability are available – Jones Act negligence and unseaworthiness (if ultimately determined to be a crew member) or only ordinary maritime negligence of the employer in its "vessel" capacity (if found not to have been a crew member). To compound the complications, the particular circumstances of the worker and the injury determine which complex of remedies disfavors which party. The relative values of the various remedies obviously depend on how likely the differing bases of tort liability are to be established and the likely allocation of contributory fault to the worker. Perhaps less obviously, they also depend on the stage of the worker's working life at which the injury occurs, how long-term the resulting disability is likely to be, and the prominence of pain and suffering (extreme, long-term, or both) as an element of the damages that would be recoverable in tort but would add nothing to an award under the Longshore Act. In a great many cases, even when tort liability on one ground or another is clear, the Longshore Act remedy is the most generous potentially available; a tort recovery will be offset entirely against compensation that would have been payable anyway. In others, the potential

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[7] *See generally, e.g.*, 2 Martin J. Norris, *Law of Seamen* § 26-3 (5th ed. 2003); 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6-29 (4th ed. 2004).

tort recovery far exceeds Longshore Act benefits. Respondent Gros believes his case falls in the second category, particularly if he is correctly classified as a crew member entitled to the grounds of recovery available to him as such.

The uncertain contours of crew-member status provide fertile ground for machinations by the parties – particularly, though not exclusively, by employers seeking to "squeeze" the worker out of access to seamen's remedies. The Longshore Act, like most state workers'-compensation laws, requires an employer aware of a disabling on-the-job injury to institute periodic compensation for disability, and to authorize medical care at its expense, without the need for any demand by the worker, unless it files a "notice of controversion" of his or her rights under the Act, specifying its grounds. Longshore Act § 14(a), (b), (d), 33 U.S.C. § 914(a), (b), (d). If the employer is concerned about potential seamen's remedies, it is hardly likely to assert that the worker has no rights under the Longshore Act because he or she was working as a crew member; it will usually report the injury as one covered by that act, and institute payments consistent with that position. It has long been settled that the worker's acceptance of such benefits has no effect on his or her right to pursue crew members' remedies. *E.g.*, *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 91 (1991). But the employer may thereafter seek to encourage the worker to file a claim under the Act by prematurely terminating such benefits, in the hope that an award in a compensation order under the Longshore Act will be issued that will somehow foreclose the crew-member assertion in tort. *Cf. Simms v. Valley Line Co.*, 709 F.2d 409 (5th Cir. 1983).[8] The employer in the pre-

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[8] The employer in *Lewis v. SSA Gulf Terminals, Inc.*, BRB No. 03-0523 (Ben. Rev. Bd. Apr. 22, 2004) (http://www.dol.gov/brb/cases/lngshore-/unpublished/Apr04/03-0523.htm), *pet. for review filed*, No. 04-60543 (filed June 22, 2004), took another approach: it sought to force an ALJ adjudication of a claim under the Longshore Act, over the injured

sent case went a step further, denying that the injured worker's employment was "maritime" at all, and paying workers'-compensation benefits only under state law. The end result was the same: an award under the Longshore Act, without the employer ever having asserted in the Longshore Act proceedings that the worker was excluded from the Act as a "crew member," or the worker ever having asserted that he was *not*, and without any tribunal having considered the question.

B. The Conflict

Petitioners blatantly overstate their case in contending that the decision below conflicts with this court's decision in *Southwest Marine, Inc. v. Gizoni* (Pet. 4-8); but it is beyond cavil that there is a conflict in the lower courts on a question *Gizoni* left open: the effect of an injured worker's pursuit of, and acceptance of benefits under, an *award* in a Longshore Act "compensation order." The decision below extended that conflict from one between federal circuits (explicitly between the Fifth and Ninth Circuits) to one between a federal circuit and a state appellate court *within* that circuit.

In *Gizoni*, a ship-repair worker who spent much of his time, and was injured, aboard a barge used in his employer's shipyard operations "submitted a claim for, and received, medical and compensation benefits from [the employer] pursuant to the Longshore Act," without a compensation order

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worker's objection that in view of the Fifth Circuit's rule that a Longshore Act award forecloses seamen's remedies (*Sharp, infra*) he wanted to preserve his crew-member contention for presentation to a jury in his Jones Act action. The ALJ granted the worker's motion to stay the hearing on his Longshore claim pending the outcome of the Jones Act suit; on the employer's appeal from the stay, the Board affirmed (while expressing its disagreement with *Sharp*). The court of appeals has not yet ruled on its jurisdiction to review the Board's decision, which is arguably not a "final order" subject to review, Longshore Act § 21(c), 33 U.S.C. 921(c).

ever having been entered, and thereafter brought an action under the Jones Act asserting that he was a member of the barge's crew. 502 U.S. at 84. Although the Fifth Circuit had held that, as a matter of law, one working in an occupation enumerated as "maritime employment" in Longshore Act § 2(3) (such as Gizoni, a "ship repairman" within § 2(3) on any apparent reading) could not be a crew member, the Ninth Circuit disagreed, holding that such a worker is entitled to try to prove the requisite connection to a vessel (or fleet) for crew-membership status. *See id.* at 85 n.1. Besides agreeing with the Ninth Circuit on that issue (*id.* at 86-89), this Court unanimously turned aside two procedural arguments against allowing the worker to get to the jury with his Jones Act claim. First, it rejected the employer's argument that the Longshore Act tribunals should have "primary," or exclusive original, jurisdiction to decide questions of coverage under that Act, including the applicability of the crew-member exclusion (among other reasons, because the Act obviously does not contemplate such a rule, in that it includes an explicit provision that time limitations on assertion of a claim under the Act begin anew upon the denial of a tort remedy on grounds of Longshore Act exclusivity[9]). *Id.* at 89-91. And second, in the passage whose meaning and implications have divided the lower courts, the Court rejected the employer's

> . . . suggest[ion] that an employee's receipt of benefits under the Longshore Act should preclude subsequent litigation under the Jones Act. To the contrary, however, we have ruled that where the evidence is sufficient to send the threshold question of seaman status to the jury, it is reversible error to permit an employer to prove that the worker accepted Longshore Act benefits while awaiting trial. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 37 (1963). It is by now 'universally accepted' that an

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[9] Longshore Act § 13(d), 33 U.S.C. § 913(d).

> employee who receives voluntary payments under the Longshore Act without a formal award is not barred from subsequently seeking relief under the Jones Act. G. Gilmore & C. Black, *Law of Admiralty* 435 (2d ed. 1975); see 4 A. Larson, *Workmen's Compensation Law* § 90.51, p. 16-507 (1989) (collecting cases); *Simms v. Valley Line Co.*, 709 F.2d 409, 412 & nn. 3 and 5 (5th Cir. 1983). This is so, quite obviously, because the question of coverage has never actually been litigated. Moreover, the Longshore Act clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the Longshore Act.[5] 33 U. S. C. § 903(e). See Gilmore & Black, *supra*, at 435.
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> [5] For this same reason, equitable estoppel arguments suggested by *amicus* Shipbuilders Council of America must fail. Where full compensation credit removes the threat of double recovery, the critical element of detrimental reliance does not appear. See *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984); *Lyng v. Payne*, 476 U.S. 926, 935 (1986). Argument by *amicus* would force injured maritime workers to an election of remedies we do not believe Congress to have intended.

502 U.S. at 91-92 & n.5.

Shortly thereafter, the Fifth Circuit considered *Sharp v. Johnson Bros.*, 973 F.2d 423 (1992), *cert. denied*, 508 U.S. 907 (1993), in which a worker was injured aboard a crane barge. The employer initiated Longshore Act benefits without any claim having been filed, but cut them off shortly after the worker filed an action under the Jones Act; he thereupon

filed a compensation claim, but the employer (despite answering in court that he was *not* a crew member) took the unusual step of denying Longshore Act liability on the ground that he *was* a crew member. 973 F.2d at 424. When the district court directed a verdict against him in the tort action on grounds that the crane barge was not a "vessel" and he was not a crew member, the worker pursued reversal of that judgment, which the Fifth Circuit granted (*Sharp v. Johnson Bros.*, 917 F.2d 885 (1991)). Meanwhile, however, back at the Department of Labor, along with the employer and its Longshore Act insurer, he entered into a settlement of his claim for Longshore Act benefits and any other claims against the employer other than those insured by its tort insurers, and an ALJ gave the settlement the required approval in a compensation order.[10] *Id.*

The district court, on remand, again dismissed the Jones Act action, this time based on the settlement-approval order, and the worker again appealed. *Id.* at 424-25. Describing the district court's reasoning in a manner presaging its own, the court of appeals first indicated that it had found that the approved settlement "constituted an election of remedies," but went on to say:

> The district court reasoned that the entry of an order by the ALJ constituted a finding that the injuries were compensable under the Longshore Act and that by seeking, and acquiescing to, the finding, Sharp is collaterally estopped from contesting Longshore Act coverage.

Id. at 425.

The Fifth Circuit affirmed. It distinguished *Gizoni* on the ground that Sharp had not merely accepted benefits and filed a claim under the Longshore Act, but had secured an *order*

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[10] *See* Longshore Act §§ 8(i), 16, 33 U.S.C. §§ 908(i), 916; 20 C.F.R. § 702.243.

making an award in the Longshore Act proceedings. It did not in any way address *Gizoni*'s explanations (quoted in full at pp. 11-12 *supra*) that the lack of preclusive effect in that case "is so, quite obviously, because the question of [crew membership] has never actually been litigated;" that the one-remedy theory was contraindicated by Longshore Act § 3(e)'s "credit" provision; and that an *equitable*-estoppel bar "would force injured maritime workers to an election of remedies we do not believe Congress to have intended." Instead, after acknowledging that "[i]t is true that Longshore Act coverage was never litigated in an adversarial proceeding," *Sharp* reasoned, "[t]here is a difference . . . between saying a plaintiff may pursue only one remedy and declaring that he may receive only one award." *Id.* at 426, 427. It did not examine or rely on any body of law relevant to the "election of remedies" doctrine, collateral estoppel, or equitable estoppel, and the opinion leaves it unclear whether it relied upon any such principle. Instead, it relied on the fact that the worker had "availed himself of the statutory machinery to bargain for an award, and he had the full opportunity to argue for (or against) coverage," and on its view that it was the "purpose" of the Longshore Act to "giv[e employers] limited and predictable liability in exchange for their giving up their ability to defend tort actions [*sic*; to avoid *any* liability by asserting tort defenses]." *Id.* at 426.[11] As the court explained it,

> Permitting a Jones Act proceeding after a formal compensation award here would defeat the purpose of the Longshore Act, as well as work unfairness, because, as here, employers often have different insurance carriers for workers' compensation claims

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[11] The *Sharp* court made no reference to the major qualification that limits the insured employer's tort immunity granted by LHWCA § 5(a): that if the employer is also the *owner or operator of the vessel* on which the injury occurs, it remains liable for negligence in that capacity (§ 5(b)).

> and tort claims, so the compensation insurer, by guaranteeing a minimum award, necessarily would reduce the ability of the tort insurer to effect a settlement.

Id. at 427.

Sharp cited no precedent at any level for its result, based on either a settlement or any other form of Longshore Act compensation order. No other reported decision appears ever to have so ruled.[12]

The Ninth Circuit in particular has gone the other way. In *Figueroa v. Campbell Industries*, 45 F.3d 311 (1995), the injured worker had settled claims under both the Longshore Act and state compensation law for an injury sustained aboard his employer's shipyard tugboat. He then filed an admiralty action seeking crew members' remedies (but acknowledging the appropriateness of an "offset" for his compensation recoveries). *Id.* at 313. A jury found that he was indeed a crew member, and the employer appealed from the resulting award of damages. *Id.* Without mention of *Sharp*,[13] the court held that its own and this Court's opinions in *Gizoni*

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[12] The only other authority on point cited by Petitioners is *Anders v. Ormet*, 874 F.Supp. 738 (M.D. La. 1994), Pet. 15. But *Anders* was decided under the controlling precedent of *Sharp*. Further, unlike that in the present case, the ALJ's award in *Anders* explicitly found non-crew-membership, and the court described the issue as having been litigated between the parties before the ALJ.

In *Roth v. U.S.S. Great Lakes Fleet, Inc.*, 1993 WL 668784 (D. Minn. Jun 18, 1993) (No. Civ. 3-91-646), *aff'd*, 25 F.3d 707 (8th Cir. 1994), the district court dismissed at the summary judgment stage on grounds that the plaintiff was not a crew member as a matter of law, and added that based on *Sharp* the issue was also foreclosed by a settlement under the Longshore Act; but the court of appeals "affirm[ed] on the former issue, and d[id] not address the latter," 25 F.3d at 708.

[13] Apparently the employer did not cite *Sharp* to the court. *See id.* at 316 ("Appellant cites no cases holding otherwise.").

controlled against the employer's collateral-estoppel argument. Part of the court's opinion proceeds on the questionable premise that this Court's resolution of *Gizoni* meant that workers who are crew members but also performing jobs expressly enumerated in the main clause of Longshore Act § 2(3) (longshoring and shipyard workers) are *entitled to* both Longshore Act and Jones Act status, with the right to recover both remedies serially (subject to credit against a later remedy for amounts recovered pursuant to the other). *Id.* at 315.[14] But the court also relied on an analysis of the limitations on the applicability of issue preclusion under the "collateral estoppel" doctrine, finding that

> Courts that have addressed the precise issue of whether the jurisdictional issue must be actually litigated for estoppel to apply in this situation have found that if the jurisdictional issue was not contested and no finding was made at the administrative level, a plaintiff is not estopped from bringing a Jones Act claim.

Id. at 316, *citing Guidry v. Ocean Drilling & Exploration Co.*, 244 F.Supp. 691 (W.D. La. 1965), and *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966). Since no finding on crew-member status had been made in the Longshore

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[14] Respondent Gros does not rely on any such theory, which appears to be contrary to the thrust of *Gizoni* – that even a worker engaged in longshoring or shipyard work may have the requisite connection to a particular vessel or fleet, whose "mission" is such work, to be a crew member, *and thus excluded from* the coverage of the Longshore Act, and is entitled to an opportunity to show such relationship so as to have access to crew members' remedies in tort. That question, however, has no bearing on this case; neither marine oil and gas work in general nor pipelaying in particular is among the activities expressly enumerated as parts of "maritime employment" within Longshore Act § 2(3), so even under the *Figueroa* reading Gros, if a crew member, was outside of the Longshore Act.

Act proceedings, there was nothing to estop litigation of that issue in the Jones Act proceedings. *Id.* at 315-16.[15]

Again in *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203 (9th Cir. 1995), *rev'd on other gr.*, 520 U.S. 548 (1997),[16] the court denied preclusive effect to an award under the Longshore Act. As this Court will remember, the injured worker there was a "deckhand" hired by the day out of a union hiring hall to perform a variety of daily assignments aboard harbor tugs owned by several different operators. Some of these daily assignments were sea-going; others, such as that in the course of which the injury occurred, were confined to maintenance work while the tug was at berth. The district court granted summary judgment dismissing his Jones Act and unseaworthiness counts, ruling that he lacked crew-member status as a matter of law when injured, and he was required to await resolution of his alternative tort count, for negligence of the vessel under Longshore Act § 5(b), before obtaining appellate review of that judgment. He then sought an award under the Longshore Act. The employer had never asserted as a defense against Longshore Act liability the proposition that, contrary to its position in the tort action (and the success that position had already enjoyed before the district court), the worker was excluded from the Act as a crew member; indeed, it had been paying some benefits under the Act from the time of the injury forward. 67 F.3d at 205. Nevertheless, at the hearing convened before the ALJ on other issues (concerning the amount payable under the Act), it asserted that he

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[15] The same rule – no preclusion by a prior compensation award unless it included a litigated decision on the issue – prevails in the context of the border between state workers'-compensation laws and the Federal Employers' Liability Act, 45 U.S.C. § 51 (the very statute the Jones Act extends to "seamen"), i.e., the "interstate commerce" inquiry. *See generally* 32B Am.Jur.2d *Federal Employers' Liability and Compensation Acts* § 53.

[16] The decision of this Court is addressed at p. 18 *infra*.

"*may* have been a Jones Act seaman"; and despite the fact that neither party had even *asserted a* position on the merits of that question (much less actually litigated it), the ALJ addressed it. *See* Pet. App. 34a-35a, *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997) (No. 95-1621). He found that the issue was not precluded by the district court's summary judgment because the ruling was interlocutory and had not become final, but agreed with the district court that the claimant-plaintiff was not working as a crew member when injured. *Id.* at 35a n.2, 37a. After resolving the issues that *were* litigated, the ALJ entered an award of continuing Longshore Act benefits.

The district court found that there was no § 5(b) negligence, and on appeal the worker challenged the district court's non-crew-member ruling. The defendant employer asserted in support of the challenged ruling that the ALJ's decision foreclosed relitigation of crew membership, but the court of appeals rejected that argument. It did not rely on *Figueroa*, noting that it had "reached the same result for different reasons." 67 F.3d at 208 n.6. Instead, it focused on this Court's reasoning in *Gizoni*, the policies that reasoning implicated, and the support of the Longshore Act § 3(e) credit provision and scholarly authority cited in *Gizoni*. These led it to the conclusion that the litigation of the Longshore Act claim to a formal award should not bar litigation of the crew-member question before the tort tribunal. *Id.* at 207-08. It relied particularly on two observations: first, that the parties' interests on the issue were reversed in the two proceedings, so as to deprive them of a motive for vigorous litigation of their purported positions on it in the compensation tribunal; and second, that – contrary to the purpose of the Longshore Act to deliver benefits without the delay incident to litigation except where the worker's rights under the Act are genuinely controverted – "imposing such a bar would result in subjecting to suit an employer who immediately and voluntarily begins compensation payments while immunizing

from suit an employer who forces his employee to seek compensation through litigation." *Id.*

Finally, although neither the court below nor Petitioners have mentioned it, this Court granted *certiorari* in *Papai* to resolve not only an intercircuit conflict with respect to the merits of the crew-member test applied by the Ninth Circuit (which combined the worker's various assignments for all three employers who hired him out of his union hiring hall to work on their harbor tugs, and treated all those tugs as a "fleet," in determining whether he bore the necessary relationship to a fleet of vessels), but also the conflict between *Sharp* and *Figueroa* and *Papai* on the preclusive effect of an award under the Longshore Act. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 550 (1997). But the majority resolved the substantive issue against the Ninth Circuit's multi-employer "fleet" approach, and hence found the worker to have been employed as a non-crew-member as a matter of law on the day of the injury; "as [that ruling] is dispositive of the case," the Court explicitly declined to reach the preclusion issue. *Id.* The dissenting opinion expressed agreement with the Ninth Circuit's view on the preclusion issue, however, on that court's *Gizoni*-based reasoning. *Id.* at 563 n.2.

The court below recognized the federal intercircuit conflict on the issue, and followed the Ninth Circuit's *Papai* reasoning. Pet. App. 5-11.

C. Prematurity of Resolution of the Issue Now

Respondent recognizes that the *correctness* of the decision below, and the error of *Sharp* to the contrary, are beside the point at the present stage, as those circumstances do not affect the need for this Court's intervention to resolve an existing conflict on a frequently recurring issue of federal law, both between federal circuits and between federal and state appellate courts within the Fifth Circuit. Neither the present

time nor the present case, however, is opportune for its resolution.

First, this Court may well substantially clarify the border between crew-member and Longshore Act status – and thus limit the importance of the issue on which the conflict exists – in a case now under consideration. Probably the most substantial area of the current uncertainty about the border between the Jones Act and the Longshore Act concerns the "special-purpose vessels" that may be classified as "work platforms" that do not constitute "vessels" capable of having "crews" within the meaning of Longshore Act § 2(3)(G). The "vessel" status of such workplaces is before the Court in *Stewart v. Dutra Construction Co.*, No. 03-814 (U.S., cert. granted Feb. 23, 2004), *reviewing* 230 F.3d 461 (1st Cir. 2000), *after remand*, 343 F.3d 10 (2003), scheduled for argument November 1, 2004. The smaller the area of uncertainty about the scope of crew-member status that survives the decision of the Court in *Stewart*, the less significant will be the existing conflict on the effect of an award under the Longshore Act on an injured ambiguous worker's right to a determination of such status in a judicial tribunal.

Second, neither the apparent view of the Fifth Circuit nor the view of the Louisiana courts is cast in stone. Most particularly, the Fifth Circuit's ruling in *Sharp* appears to have been heavily influenced by pique at counsel's lack of "candor and respect" in failing to bring the Longshore Act settlement to the court's attention when the case was before the court the *first* time. *See Sharp*, 973 F.2d at 427 n.3.[17] That court

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[17] The court's irritation despite the acknowledged fact that, based on the plain and expressed intent of parties to the settlement that it not affect the liabilities at issue in the pending tort action, they "may legitimately have believed that the Longshore Act settlement was irrelevant to the Jones Act action," *id.*, was perhaps greatly amplified by the fact that its opinion on the first appeal, 917 F.2d 885 (1991), opened a significant schism in Fifth Circuit precedent on the scope of the "work platform"

has not had the opportunity to reconsider *Sharp* in a case in which counsel have been satisfactorily forthright. Nor has it addressed the issue since other courts have reached a contrary conclusion and scholarly commentary has condemned it.[18] Thus, if (as we believe) the Fifth Circuit's lone decision holding that an award under the Longshore Act, even by way of approval of a settlement, without litigation or decision of the crew-membership issue is wrong, that court may well correct its own error without the need for this Court's intervention. At a minimum, any revisitation of the issue by that court would likely clarify what legal theory or doctrine the preclusion-by-award rule rests on.

Likewise, the decision below represents binding precedent only in Louisiana courts within the state's Third Circuit. If, as Petitioners contend, the decision is in error, another circuit of the Louisiana courts of appeal would be free to disagree with it, setting the stage for correction of the putative error of the decision below by the Louisiana Supreme Court. Although such action would do nothing to resolve the existing federal intercircuit conflict, it would eliminate the particularly pressing need to resolve the present in*tra*circuit conflict, without the need for action by this Court.

Further still, this is not an appropriate case for the Court to resolve the existing conflict because it does not represent the full scope of that conflict. The Ninth Circuit has held that

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exception to crew membership (*see, e.g.*, Jack L. Allbritton & David W. Robertson, *Seaman Status After Chandris, Inc. v. Latsis*, 8 U.S.F. Mar. L.J. 29, 50 & n. 156, 52-53 (1995)).

[18] *See* Victoria L.C. Holstein, Comment, *The Overlap Preclusion Trap Between the Jones Act and the Longshore and Harbor Workers' Compensation Act*, 76 Tul. L. Rev. 783 (2002). *See particularly, e.g., id.* at 815 (*Sharp* "is unsupported by traditional common law preclusion principles and contradicts the Supreme Court's reasoning in *Gizoni*, which, at a minimum, required a finding of nonseaman status [in the Longshore Act proceedings] to trigger preclusion.")

even a direct, explicit finding by an ALJ, in proceedings on a claim under the Longshore Act, that the claimant was not a crew member does not preclude *de novo* consideration of that issue in a tort action. *Papai*, discussed at pp. 16-17 *supra*. There was no such finding in the Longshore Act proceedings in this case (and see Part II *infra*). The significant issue that was unnecessary to address in *Gizoni* (because the crew-member issue "ha[d] never actually been litigated" in Longshore Act proceedings in that case), and that was before the Court but left unresolved in *Papai*, is whether a *finding on the same issue* in Longshore Act proceedings has the necessary "finality" in the Longshore Act's own scheme, and enough indicia of a reliable full and fair litigation of the issue by parties with a sufficient stake in its outcome, to be given preclusive effect in subsequent judicial proceedings, under general principles of "administrative estoppel" and traditional "collateral estoppel."[19] This case does not present that issue. Affirmance of the decision below in the present case by this Court could readily be based on the ground that here, as in *Gizoni*, the crew-member issue "has never actually been litigated," so there is no finding on the relevant issue that could be given issue-preclusive effect even if ordinary administrative-estoppel principles should govern. This would correct the aberrant Fifth Circuit rule in *Sharp*, which can only rest on some sort of "election of remedies" theory that is plainly

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[19] *See generally Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991); Longshore Act § 22, 33 U.S.C. § 922 (findings of fact in a compensation order under the Longshore Act are subject to change, throughout the term of an award, or on motion made within a year after a last payment or a denial of the claim, for mere "mistake" – even based "merely [on] further reflection on the evidence initially submitted," *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971)); *see also Restatement (Second) of Judgments* § 28(5)(c), at 273-274 (1982) (issue preclusion is inappropriate where the party to be precluded did not have an adequate incentive in the initial action to litigate vigorously his present position).

inconsistent with the reasoning of *Gizoni* (502 U.S. at 92 n.5). But that would leave unresolved the further important dimension of the existing conflict, as represented by the Ninth Circuit's decision in *Papai*: whether an *explicit non-crew-member finding* in Longshore Act proceedings has issue-preclusive effect.

Finally, although the ruling below, that Gros's Longshore Act award does not foreclose him from continuing to contend in his tort action that he was a crew member when injured, is "final" in the sense that that proposition of federal law will not be further considered by the state courts in his case, it may turn out not to have any effect on the ultimate disposition of his crew-member action. In the trial-court proceedings that will follow on remand (either in the absence of intervention by this Court or in the event the Court affirms the court of appeal's ruling), any of several possible outcomes could moot the preclusion issue in this case. First, a jury might find that Gros was not a crew member. And second, *regardless* of how it rules on that issue, the jury might find that his injury resulted from ordinary maritime negligence of Settoon Construction in its capacity as owner and operator of the pipelaying vessel, entitling Gros to recover the same damages under Longshore Act§ 5(b) as a non-crew-member *or* under the Jones Act or general maritime law as a crew member. In the event of any such outcome, the issue on which Petitioners seek this Court's present review would have no practical effect, beyond presentation of the crew-member status issue for determination in the trial court. Under such circumstances, although this Court has *authority* to grant review at the present juncture, it should allow this case to go forward to conclusion. If, upon final disposition, Petitioners are adversely affected by the ruling below – i.e., if the jury has found that Gros was a crew member, and awarded damages under a Jones Act or unseaworthiness standard but not on a maritime-common-law negligence basis –, and if the issue-preclusion question remains in conflict in the lower

courts at that time, this case would be in a far better posture for this Court's attention than it is now.

II. Petitioners Misstate the ALJ's Findings in Contending that They Establish that as a Matter of Law Gros Could Not Have Been a Crew Member.

Petitioners purport to present a second question for the Court's consideration:

> Whether a finding of fact by an ALJ for the Department of Labor which determines that a longshoreman spent 5-10% of his relevant work history on navigable waters precludes a claimant from relitigating this issue in a subsequent proceeding based on the Doctrine of Collateral Estoppel.

Pet. i. But no such question can be presented by this case, for the ALJ did not make the stated finding, and even if he had it would not foreclose crew-member status because the "relevant work history" would be markedly different for purposes of crew membership than it was in the context of whether Gros's employment was "maritime" within the Longshore Act.

Petitioners begin their argument directed to this point (Pet. 13-17) by quoting accurately the finding of the ALJ, based on examination of Gros's entire course of work over the years for Settoon, primarily as a "vacuum truck driver," that Gros spent "*at least* five to ten percent of his time in a covered activity, a 'not insubstantial' amount of his work on navigable waters, which was neither transient nor fortuitous." Pet. App. 53, *quoted*, Pet. 13 (emphasis added). Again, no one ever asserted in the Longshore Act proceeding that Gros was excluded from the Act as a crew member; the ALJ's finding was made for purposes of the determination whether Gros's employment was "maritime" so as to be within the Longshore Act or non-maritime so as to be within Louisiana

compensation law. But Petitioners then premise their argument on the assertion that the ALJ made "a factual determination . . . that [Gros] spent *somewhere between* 5-10% of his time working on a vessel." Pet. 14. Indeed, two pages later this misstatement has grown a pair of quotation marks and a purported citation (and propelled Gros overboard): the ALJ "made a specific finding of fact that Mr. Gros *'spent somewhere between 5-10% of his time in navigable waters'*. (App. 53)." Pet. 16 (emphasis added). Plainly, the ALJ made no such finding. *Cf.* S. Ct. Rule 14.4.

The legal premise of Petitioners' collateral-estoppel contention is no more valid than its factual premise. It submits that under *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), as a matter of law a worker cannot have the "substantial connection" to a vessel (or fleet under common ownership or control) necessary for crew membership if he "spends less than approximately thirty percent . . . of his time" aboard. Pet. 14. But *Chandris* made clear, and *Papai* emphasized, that the worker's entire course of assignments during his or her full tenure with the employer may not be the appropriate frame of reference, and that the thirty-percent "rule of thumb" would be inappropriate in some cases, *particularly in the event of a new assignment with different duties*:

> [W]e see no reason to limit the seaman status inquiry ... exclusively to an examination of the overall course of a worker's service with a particular employer. . . . If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position.

Chandris, 515 U.S. at 371-372. As the Court explained in *Papai*, this meant that "the employee's prior work history with a particular employer may not affect the seaman inquiry if the employee was injured *on a new assignment* with th[at]

employer, an assignment *with different 'essential duties'* from his previous ones." 520 U.S. at 556 (emphasis added).

Obviously the determination in the trial court whether Gros was working as a member of the crew of the pipelaying barge at the time of his injury is likely to turn, under these authorities, on whether he was working for a different "particular employer," or at least was on a different "assignment," while "lent" by Settoon, for whom he had worked primarily as a vacuum-truck driver – sometimes being ferried aboard a barge to oil- and gas-well sites but mostly driving to well sites ashore – to Settoon Construction to lay pipe aboard a barge, an entirely "sea-based" job in the sense that it was performed aboard a vessel away from shore. The merits of that question are, of course, far from being before this Court for any consideration; but it is critically significant that the question is an entirely different one from that addressed by the ALJ, for purposes of the Longshore Act, without any attention to the question of the appropriate timeframe (nor any need for such consideration, since even on the broadest possible consideration Gros's cumulative presence aboard vessels was "not insubstantial," Pet. App. 53). The basic facts found by the ALJ – which are not, in fact, in any dispute – may well establish that *in his work as a vacuum-truck driver*, even while he and his truck were en route on a barge to marine wells, he was not a member of the barge's crew. But he was working for a different employer, with entirely different duties, when injured, a fact with no Longshore Act "maritime employment" consequences but of potentially determinative importance to the crew-member question.

Petitioners' contention that the Court should address in this case whether an ALJ's actual findings of basic fact have issue-preclusive effect is thus based on incorrect factual *and* legal premises. The ALJ did not make the finding Petitioners assert, and made no findings "on the same issue" as those relevant to Gros's crew-member status – i.e., on his relation-

ship to the Settoon Construction pipelaying barge during the tenure of his employment with that company on the pipelaying job, and whether that was a relevant "new assignment" within the meaning of this Court's Jones Act authorities.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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